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No.

In the Supreme Court of the United States

OCTOBER TERM, 1985

INDEPENDENT NEWS, INC., a corporation;
RONALD A. BUEL and RICHARD H. MEEKER,

Petitioners,

v.

BANK OF OREGON, a corporation, and
HOMER G. WADSWORTH,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OREGON

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QUESTION PRESENTED

Are a state bank and its president public figures in this action for defamation and invasion of privacy brought by the bank and its president against members of the news media?

PARTIES TO THE PROCEEDING

Independent News, Inc.

Ronald A. Buel

Richard H. Meeker

Bank of Oregon

Homer G. Wadsworth

DESIGNATION OF CORPORATE RELATIONSHIPS

Independent News, Inc. (now known as Scholls West Building, Inc.) filing this Petition for Writ of Certiorari as petitioner in this proceeding, states that:

This is its original Designation of Corporate Relationships.

Guard Publishing Company is the parent company of Scholls West Building, Inc.

Scholls West Building, Inc. does not have an ownership interest in any subsidiaries.

The only affiliates of Scholls West Building, Inc. are Times Publishing Company, Pedah Company, Willamette Newspapers Incorporated, and Tualatin-Yamhill Press, Inc.

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The trial court granted Defendants' Motion for Summary Judgment on the grounds that there was no material question of fact as to whether Defendants violated the applicable standard of care, which the Court found to be gross negligence, an objective standard between negligence and actual malice.

The Oregon Court of Appeals reversed the decision of the trial court and held that the applicable standard of care was negligence, and found that Plaintiffs were not public figures.

The Oregon Supreme Court affirmed the decision of the Court of Appeals, and denied Defendants' Petition for Rehearing.

JURISDICTIONAL STATEMENT

In an opinion entered January 8, 1985 (Appendix A), the Oregon Supreme Court affirmed a decision by the Oregon Court of Appeals to reverse the trial court's grant of summary judgment for Defendants and remanded the case for trial on the merits. Defendants' petition to the Oregon Supreme Court for rehearing was denied in an opinion entered March 20, 1985 (Appendix F). This Court may exercise jurisdiction under 28 USC §1257(3).

Petitioners seek review of an opinion that is not a final judgment granting or denying relief. Nevertheless, that opinion finally determined that as a matter of federal constitutional law, a publicly held, state-chartered bank with 18 branch offices, and its president, are not public figures for purposes of their libel action against a newspaper and its reporters.

In granting summary judgment the trial court ruled that as a matter of law the alleged libelous article was not published with actual malice. That decision was not challenged on appeal by Plaintiffs. A ruling by this Court that Plaintiffs are public figures would dispose of the litigation. If the case is remanded for trial, Defendants may prevail on the basis of non-federal, common law defenses and privileges, and the Oregon Supreme Court's decision on a First Amendment question of immediate importance will be removed from the purview of this Court.

Under such circumstances, this Court has exercised its authority to issue a writ of certiorari to a state court of last resort. *See, Cox Broadcasting Corporation v. Cohn,* 420 U.S. 469, 95 S. Ct. 1029, 43 L. Ed. 2d 328 (1975). Here, as in *Cox Broadcasting,* there is an

important question of freedom of the press. In an age of increasing identity of financial institutions with the government and increasing government regulation of such institutions, the conduct of banks ought to be scrutinized no less than units of government and the conduct of bank presidents no less than the conduct of public officials.

Furthermore, by asserting its jurisdiction in this matter, the Court may "avoid 'the mischief of economic waste and of delayed justice'" (*Cox Broadcasting v. Cohn, supra,* 420 U.S. at 478, 95 S. Ct. at 1037, 43 L. Ed. 2d at 339) by putting an end to a lawsuit which, to date, has spanned six years and which has created uncertainty for those media who would publish criticism of highly regulated financial institutions.

CONSTITUTIONAL PROVISIONS INVOLVED

1. The First Amendment, United States Constitution, which provides:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

2. The Fourteenth Amendment, Section One, United States Constitution, which provides:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

This is an action for $7.4 million in damages for defamation and invasion of privacy brought against the publisher of the Willamette Week, a weekly newspaper and two reporters. The plaintiffs are an Oregon bank and its president. The alleged defamatory statements were made in a news article that reported charges of unethical and illegal banking practices.

Plaintiff Bank of Oregon is a state bank based in Woodburn, Oregon, near Portland, with 18 branches in the Portland area. When the article was published in 1978, the Bank had over 400 shareholders and was capitalized at approximately $100,000,000. Plaintiff Wadsworth, in addition to being bank president, was the majority shareholder.

The article was jointly written by Defendants Buel and Meeker. It

described charges by a Portland businessman, Richard Cross, that another Portland businessman, Wilburn Duncan, conspired to use Cross's credit from his profitable business to Duncan's advantage; that the bank and its president wrongfully acted in furtherance of the scheme; and that someone at the bank forged Cross's initials on notes transferring $150,000 of funds from Cross's business account at the bank to Duncan's account to pay off bank loans. The article also stated that the reporters' investigation disclosed that the bank president had been involved in two "insider transactions" with the bank concerning business matters unrelated to those that were the subject of Cross's charges, that such transactions did not violate applicable laws and regulations, but that they did raise ethical questions.

The article was the result of a month long investigation by Buel and Meeker into Cross's charges. The reporters decided to publish the article because they believed it was newsworthy in that it involved serious charges of improper banking practices and breaches of the normal standards of business ethics in the Portland community which had affected, and could substantially affect, a large number of people.

REASONS FOR GRANTING THE WRIT

Just 21 years ago this Court decided *New York Times Co. v. Sullivan,* 376 U.S. 254, 84 S. Ct. 710, 11 L. Ed. 2d 686 (1964). Citing the "profound national commitment to the principle that the debate on public issues should be 'uninhibited, robust, and wide-open,'" this Court held that the First Amendment to the federal Constitution requires protection even for false and defamatory publications about public officials provided that the publication is not made with actual malice. *Id.* at 270, 279-80, 84 S. Ct. at 721, 726, 11 L. Ed. 2d at 701, 706.

This Court, however, clearly understood that more than merely speech about public *officials* required breathing room in the form of protection for good faith mistakes. In his opinion for the

court, Justice Brennan referred to the "prized American privilege to speak one's mind, although not always with perfect good taste, on all *public institutions*"; to the "general proposition that freedom of expression upon *public questions* is secured by the First Amendment;" and to the danger that insufficient protection "dampens the vigor and limits the variety of *public debate.*" *Id.* at 269, 279, 85 S. Ct. at 720, 725, 11 L. Ed. 2d at 700, 706 (Emphasis supplied). Thus the focus was not on the behavior of those who are public officials, alone, but also upon the freedom to discuss all issues that are public.

What was implicit in *New York Times* was made explicit three years later in *Curtis Publishing Co. v. Butts,* 388 U.S. 130, 87 S. Ct. 1975, 18 L. Ed. 2d 1094 (1967), when the court extended the actual malice standard to

libel actions by "public figures" against media defendants. Chief Justice Warren's concurring opinion in *Butts* emphasized the impact of nongovernmental institutions and individuals on public affairs:

> "To me, differentiation between 'public figures' and 'public officials' and adoption of separate standards of proof for each have no basis in law, logic, or First Amendment policy. Increasingly in this country, the distinctions between governmental and private sectors are blurred. Since the depression of the 1930's and World War II there has been a rapid fusion of economic and political power, a merging of science, industry and government, and a high degree of interaction between the intellectual, governmental, and business worlds. Depression, war, international tensions, national and international markets, and the surging growth of science and technology have precipitated national and international problems that demand national and international solutions. While these trends and events have occasioned a consolidation of governmental power, power has also become much more organized in what we have commonly

> considered to be the private sector. In many situations, policy determinations which traditionally were channeled through formal political institutions are now originated and implemented through a complex array of boards, committees, commissions, corporations, and associations, some only loosely connected with the government. This blending of positions and power has also occurred in the case of individuals so that many who do not hold public office at the moment are nevertheless intimately involved in the resolution of important public questions or, by reason of their fame, shape events in areas of concern to society at large.
>
> Viewed in this context, then, it is plain that although they are not subject to the restraints of the political process, 'public figures', like 'public officials', often play an influential role in ordering society." 388 U.S. at 163-64, 87 S. Ct. at 1996, 18 L. Ed. 2d at 1116 (Warren, C.J., concurring).

The question presented to this Court is whether constitutional protection required for a discussion of

"public questions" and "public debate", specifically speech about "public officials", "public figures", and "public institutions", applies to press discussion of publicly regulated banks and those who run them. It is important that this Court decide this question for the following reasons:

1. **The question of what or who is a public figure has created uncertainty, both for courts and for the press.**

Eighteen years ago, this Court committed itself to the task of exploring and clarifying the delicate interaction between the common law of libel and the constitutional law of freedom of speech and of the press which it had announced in *New York Times Co. v. Sullivan, supra.* Acknowledging that the sweep of the *New York Times* rule had not yet been "fully settled" the Court, in a statement rich with promise, introduced the companion

cases of *Curtis Publishing Co. v. Butts* and *Associated Press v. Walker,* 388 U.S. 130, (1967), 87 S. Ct. at 1975, 18 L. Ed. 2d at 1094, (1967), with these words:

> "The resolution of the uncertainty in this area of libel actions requires, at bottom, some further exploration and clarification of the relationship between libel law and the freedom of speech and press, lest the *New York Times* rule becomes a talisman which gives the press constitutionally adequate protection only in a limited field, or, what would be equally unfortunate, one which goes too far to immunize the press from having to make just reparation for the infliction of needless injury upon honor and reputation through false publication. *Id.* at 135, 87 S. Ct. at 1981, 18 L. Ed. 2d at 1099.

Seven years later the Court announced its decision in *Gertz v. Robert Welch, Inc.,* 418 U.S. 323, 94 S. Ct. 2997, 41 L. Ed. 2d, at 789, (1974), which begins with this succinct summary: " This

court has struggled for nearly a decade to define the proper accomodation between the law of defamation and the freedom of speech and press protected by the First Amendment. With this decision, we return to that effort." *Id.* at 325, 94 S. Ct. at 3000, 41 L. Ed. 2d at 797. The Court eschewed a case-by-case balancing of the competing needs of the press and the libel plaintiff because such an approach "would lead to unpredictable results and uncertain expectations, and it would render our duty to supervise the lower courts unmanageable. Because an *ad hoc* resolution of the competing interests at stake in each particular case is not feasible, we must lay down broad rules of general application." *Id.* at 343-44, 94 S. Ct. at 3009, 41 L. Ed. 2d at 807.

The "broad rules" (subsequently described as "rationale" in *Wolston v. Reader's Digest Ass'n.*, (1979)), have not led

to predictable results and certain expectations. Given the underpinnings of the *New York Times* commitment to "uninhibited, robust, and wide open" debate on public issues, it seems ludicrous that a football player (*Chuy v. Philadelphia Eagles Football Club,* 595 F.2d 1265, 1280 (3d Cir. 1979)), a belly dancer (*James v. Gannett Co.,* 40 N.Y.2d 415, 386 N.Y.2d 871, 353 N.E.2d 834 (1976)), a weightlifting coach (*Hoffman v. Washington Post Co.,* 433 F. Supp. 600 (D.D.C. 1977), *aff'd.,* 578 F.2d 442 (D.C. Cir. 1978)), and Elvis Presley's former girlfriend, (*Brewer v. Memphis Publ. Co.,* 626 F.2d 1238, 1255 (5th Cir. 1980), *cert. denied,* 452 U.S. 962 (1981)), should be classed as public figures or that a receptionist in an Army pediatric clinic is a public official (*Auvil v. Times Journal Company,* No. 83-187-NN, 10 Media L. Rep. 2302

(E.D. Va. 1984)). The teaching of *New York Times* and the First Amendment cannot be that speech about such persons is to be encouraged and protected, while speech concerning such quasi-public entities as banks, is not.

Many courts have struggled with the uncertainty of the public figure concept as presently defined. *See, e.g., Rosanov v. Playboy Enterprises,* 580 F.2d 859, 861 (5th Cir. 1978) ("the public figure concept . . . falls within that class of legal abstractions where 'I know it when I see it,' in Mr. Justice Stewart's words."); *Harris v. Tomczak,* 94 F.R.D. 687, 697 (E.D. Cal. 1982) ("a fundamental problem in the resolution of libel cases is the failure of the Supreme Court to provide an adequate definition of the term 'public figure'"); *Rosanov v. Playboy Enterprises,* 411 F. Supp. 440, 443 (S.D. Ga. 1976), *aff'd.,* 580 F.2d 859

(5th Cir. 1978) ("Defining public figures is much like trying to nail a jellyfish to the wall.") This Court must resume its efforts to explore and clarify the reach of *New York Times* for the sake both of the courts and of the media.

This effort is especially needed where the libel plaintiff is a highly regulated, quasi-public entity such as a bank. Some courts have recognized that such plaintiffs occupy a position in society quite different from individuals or true private enterprises. *See, e.g. Reliance Ins. Co. v. Barron's,* 442 F. Supp. 1341 (S.D.N.Y. 1977); *American Benefit Life Ins. Co. v. McIntyre,* 375 So. 2d 239 (Ala. 1979); *Coronado Credit Union v. KOAT Television,* 99 N.M. 233, 656 P.2d 896 (1982).

The Oregon courts, however, failed to recognize that banks are much more akin to government than to private

individuals, that they owe their very existence to public charter, are pervasively regulated by federal and state laws, and have no private life to lose through media discussion of their banking activities. *See, e.g., Bank of Oregon v. Independent News, Inc.*, 65 Or. App. 29, 36, 670 P.2d 616, 621 (1984) ("We conclude that the bank, like the corporate plaintiff in *Bruno & Stillman, Inc. v. Globe Newspaper Co., supra,* is a 'paradigm middle echelon, successful' business, 633 F2d at 592, and is not a public figure by reason of engaging in that business, being subject to the routine or usual regulation of that business or being incorporated.")

A bank is a fundamentally different entity from the business that sold fishing boats in *Bruno & Stillman, Inc.*, and discussion of a bank's practices ought to be encouraged by the First Amendment.

This is true more today than ever as the federal government actively and successfully encourages the public to save its money in banks through such incentives as Individual Retirement Accounts. The court may take judicial notice of the recent bank failures, and public disruption caused by runs upon savings and loan associations in Ohio and Maryland. The trust and reliance placed upon banks by the public stems from the appearance of a close relationship with government. Investors who enter the banking industry knowingly and voluntarily enter a sector which is more public than private, and by doing so, ought not to be permitted more protection from public scrutiny than similar government agencies.

2. A decision by this court is needed on the question of whether businesses regulated in the public interest are public

figures for the purpose of media discussion of their business activities.

This Court has not yet decided whether a business that is pervasively regulated in the public interest is a public figure for defamation law purposes. This is a critically important question because public criticism of regulated industries is tantamount to public criticism of the regulators themselves, i.e., the government agencies charged with protecting the public interest. The public interest demands free and open discussion of the activities of regulated industries so that members of the public can determine if the regulators are doing their jobs. An actual malice standard is necessary to protect such open discussions.

Lower federal courts and state courts have shown keen awareness of these crucial points:

"The fact that a business is government regulated in some respect demonstrates that the public (through its elected officials who impose the regulation) deems certain activities of such great public interest that it is unwilling to countenance them being kept entirely behind closed doors, but requires that they be scrutinized by the public's delegate, the government regulator. In this case, the relevant aspects of Beech's business, . . . are subject to scrutiny by government regulators because the public has deemed airplane safety important enough to justify that scrutiny. Therefore, by entry into this regulated activity, Beech in essence invited scrutiny. Moreover, it is inherently impossible to tease out the actions of the regulators and those they regulate when it comes to criticism. How can one possibly criticize the government and its officials (who are plainly within the 'actual malice' test under *New York Times* and *Gertz*), and say that they are not promoting public safety sufficiently since they certified a dangerous airplane, without implicitly criticizing Beech? By the same token, how can you criticize Beech for certifying a dangerous airplane and for impeding a government investigation by stalling and

> stonewalling without implicitly criticizing the government, which allowed Beech to get away with such behavior despite the public's demand for safe airplanes? There is no separating the two: if you get in a regulated business, you're inviting criticism when it comes to the area of the regulation." *Beech Aircraft v. National Aviation Underwriters,* 11 Media L. Rep. 1401, 1411 (D. Kan. 1984).

See also, Coronado Credit Union v. KOAT Television, Inc., 99 N.M. 233, 656 P.2d 896, 904 (1982), finding that credit unions are public figures because of the strong public interest in knowledge of their activities:

> "Credit unions under New Mexico law are so involved with the public interest that they must be comprehensively regulated and guaranteed by the state and are functionally equivalent to banks. Banks have been recognized as more than a purely private enterprise. In *Lynch v. Santa Fe National Bank,* 97 N.M. 554, 627 P.2d 1247 (Ct. App. 1981), *cert. den'd.* June 30, 1981, the court stated, 'Banks perform an

> important and necessary public service. It cannot be seriously argued that they are not affected with a public interest.'" 627 P.2d at 1252, quoting *Hy-Grade Oil Co. v. New Jersey Bank,* 138 N.J. Super. Ct. 112, 350 A.2d 279 (1975).

The plaintiff Bank of Oregon in the present case is subject to close regulation by both the state and federal governments under O.R.S. Ch. 706-717 and 12 U.S.C. §§1-3620. The Oregon Court has previously recognized that this regulation is in the public interest:

> "[S]ociety today regards banks as quasi public institutions. The extensive legislation upon our statute books conferring comprehensive authority upon bank departments place banks under the supervision of the state's officials from the day they are organized." *Hansen v. Harris,* 145 Or. 487, 498, 28 P.2d 649, 653 (1934).

See also, American Benefit Life Ins. Co., v. McIntyre, 375 So. 2d 239 (Ala. 1979), and *Reliance Insurance Co. v. Barron's,* 442 F. Supp. 1341 (S.D.N.Y. 1977), where courts have found insurance companies to be public figures because they invited public scrutiny by entering a regulated field.

The Oregon Supreme Court in this case, without analysis, refused to consider this argument "in favor of a stricter application of the *Gertz* standard." *Bank of Oregon v. Independent News, Inc.,* 298 Or. 434, 444, 693 P.2d 35, 42 (1985). To hold, as the Oregon court did, that a bank does not "exhibit 'pervasive involvement in the affairs of society,'" *Id.,* is to ignore social realities. It is hard to imagine a nongovernmental institution which has more pervasive power and influence in a community.

As the dissent by Justice Betty Roberts aptly points out:

> "Banking is a pervasively regulated business in which public scrutiny is the norm. Defendants' article questioned the integrity of certain financial transactions of Plaintiff bank, a topic of which public review is anticipated." *Id.* at 451, 693 P.2d 47.

If state and lower federal courts are permitted to find that banks are private figures, such scrutiny will be seriously impaired by the threat of large defamation actions such as this one. Small and not so small newspapers will not run the risk of publishing criticism of powerful financial institutions. The purpose of providing federal constitutional protection to public discussion of those involved in public controversies and public affairs will be thwarted.

3. This case gives the court the opportunity to decide whether an individual

responsible for formulating and implementing policies of an entity is a public figure when the entity is a public figure.

A bank president is a public figure both because of the power and influence that accompanies his office and because criticism of a public figure bank is impossible without implicating those who run it.

To find that a bank is a public figure without also finding that its president is a public figure for the purpose of discussing his activities as president, is like protecting criticism of the government without protecting criticism of government officials.

If this aberrant decision of the Oregon appellate courts is permitted to stand, protected criticism of business and other entities, organizations and institutions will be impaired by the fear that the criticism may implicate those who

run the organizations. Such a decision dangerously erodes the constitutional protection created by this Court in *New York Times v. Sullivan* and its progeny.

CONCLUSION

The opinion of the Oregon Supreme Court on the public figure status of a bank and its president should not be allowed to stand without review by this Court. The issues involved are fundamental to the law of defamation and freedom of speech, and are clearly and plainly presented in the record of this case. Petitioners respectfully request that this Court issue a writ of certiorari to the Oregon Supreme Court and clarify the unsettled state of the law in this area.

Respectfully submitted,

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[Appendix A]

IN THE SUPREME COURT OF THE STATE OF OREGON

BANK OF OREGON et al, Respondents on Review, v. INDEPENDENT NEWS, INC. et al, Petitioners on Review.	)	A7908-03679 CA A24067 SC S30174

On Review from the Court of Appeals.

Argued and submitted May 2, 1984.

Before Peterson, C. J., Lent, Campbell, Roberts, Carson and Jones, Justices.

Decided January 8, 1985.

CAMPBELL, J.

The decision of the Court of Appeals is affirmed and the case is remanded to the Circuit Court.

Roberts, J., concurred in part, dissented in part and filed an opinion.

CAMPBELL, J.

The issue on review is the standard of culpability that these plaintiffs must prove in order for a court or jury to hold media defendants liable for defamation.

Plaintiffs Bank of Oregon and Wadsworth, its president, brought this libel action against defendants Independent News, Inc., publisher of the "Willamette Week," and Buel and Meeker, two reporters for the newspaper. Plaintiffs pleaded that defendants wrote and published an article which was false and defamatory with knowledge of its falsity or reckless disregard of its truth or falsity and with an actual intent to defame plaintiffs. Plaintiffs alleged damages totaling $7,400,000 as a result of the defamation. Plaintiffs requested defendants to publish a retraction of the

defamatory statements in the article and defendants refused to do so.

The article was entitled "A Lot Off the Top" and dealt at some length with banking transactions involving plaintiffs and Richard Cross, the primary source of information for the article. The article as a whole indicated that plaintiffs had engaged in numerous wrongful acts to divert Cross' money and credit to another bank customer.

Plaintiffs filed a complaint on August 3, 1979. After extensive discovery, defendants moved for summary judgment on October 21, 1981. Plaintiffs moved to amend their complaint on January 29, 1982, to include an allegation that defendants had negligently published the article; that is, published it without due care to ascertain whether the article was true. The trial judge denied the motion to amend

on the stated ground that negligence was not a proper standard in this case for proof of defendants' culpability in publishing the article.

The trial judge entered summary judgment for defendants, reading into the record his belief that the plaintiffs must prove gross negligence on the part of defendants to prevail, and that plaintiffs had not demonstrated sufficient facts to prove that defendants, judged by an objective standard, had engaged in reckless conduct.[1] The Court of Appeals reversed and remanded the case. 65 Or App 29, 670 P2d 616 (1983). It held that the proper standard of liability was negligence (the care of a reasonably prudent, careful and skillful journalist) and that summary judgment for defendants was error.

Although the issue raised in this case will ultimately require

analysis of the Oregon and United States Constitutions, we shall first examine the Oregon common law on libel. Once the standard of liability required under Oregon caselaw is determined, we will ascertain whether that standard is consistent with the Oregon Constitution. If so, we will decide whether that standard is consistent with the federal constitution as interpreted by the Supreme Court of the United States.

The action of defamation is brought by a person who has been libelled or slandered by the utterance of another. To be actionable, the utterance must defame the person bringing the action. Three categories of affirmative defenses are available: (1) the utterance was true; (2) the utterance was absolutely privileged; or (3) the occasion of the utterance was qualifiedly privileged. The latter defense, unlike the others,

does not bar the action, but requires plaintiff to prove that the defendant acted with actual malice.

At Oregon common law, lack of culpability could establish a defense to a libel action in certain circumstances. Where the qualified privilege of "fair comment and criticism" was applicable, the defendants would not be liable if the publication was made in good faith and without malice. *Peck v. Coos Bay Times Pub. Co.*, 122 Or 408, 259 P 307 (1927). *Peck* stated that statements published in defendant's newspaper "concerning plaintiff's political activities and his alleged affiliation with the Ku Klux Klan came within the doctrine of qualifiedly privilege ***." 122 Or at 422. This holding was based primarily upon the fact that plaintiff had entered the political arena, though he was not a public official or candidate. This court stated that in

such a situation defendants were not liable for statements that did not attack the character, morals, or lawfulness of plaintiff unless they published the statements with actual malice. 122 Or at 420-21. *Peck* also held that statements that plaintiff committed a criminal assault and that he was a "double-crosser" were not fair comment or criticism nor qualifiedly privileged and that, therefore, truth of the statements was the only defense. 122 Or at 422. This was so even though the "double-crosser" reference was made concerning plaintiff's political activities. 122 Or at 419.

Kilgore v. Koen, 133 Or 1, 8, 288 P 192 (1930), stated that a qualified privilege existed for fair and impartial reports of judicial proceedings, regardless of the nature of the proceedings or whether they were recorded. The article in *Kilgore* as a whole

was determined as a matter of law to be such a privileged report. Thus, the burden of proving actual malice rested upon plaintiff. 133 Or at 9.[2]

The facts in *Marr v. Putnam*, 196 Or 1, 246 P2d 509 (1952), are similar to the instant facts. An article suggesting that plaintiffs were "slickers" operating a "radio racket" was published by defendants. Although defendants maintained that the article merely commented on matters of public interest and was therefore qualifiedly privileged, this court held that the publication of assertions of misconduct, not acknowledged or proved to have occurred, is not privileged under Oregon law. 196 Or at 30-35. The article did not expressly allege the commission of a crime by the "slickers." Nevertheless, this court found that "[n]o matter how honest his motive" a journalist does not have a

privilege to proclaim that an individual has committed a crime or to proclaim, based upon rumor, that an individual has frailties or a bad character. 196 Or at 34-35.

These three cases required proof of actual malice only where the defamatory statements are qualifiedly privileged. The qualified privileges discussed do not encompass the publication of the instant article read as a whole. The article at issue contains statements that might be considered of public interest, but they are not of the type that the common law considered qualifiedly privileged. That being the case, notwithstanding the confusion regarding "malice" in common law libel actions, *see supra* note 2, at least some of the statements in the article, if proved false and defamatory, need not have been published with any level of culpability

for the defendants to be liable for their publication. The common law would hold the instant defendants liable even if they were without fault.[3]

Defendants argue that Article I, section 8 of the Oregon Constitution precludes the imposition of liability without fault for a defamatory publication. Plaintiffs disagree and allege that Article I, section 10 of the Oregon Constitution requires that a remedy be provided for injury to reputation. Article I, section 8 provides:

> "No law shall be passed restraining the free expression of opinion, or restricting the right to speak, write, or print freely on any subject whatever; but every person shall be responsible for the abuse of this right."

Article I, section 10 provides:

> "No court shall be secret, but justice shall be administered, openly and without purchase, completely and without

> delay, and every man shall have remedy by due course of law for injury done him in his person, property, or reputation."

A tension exists within Article I, section 8 between the right to communicate on any subject whatever and the abuse of this right. There is no basis under the Oregon Constitution to provide more protection to certain nonabusive communication based upon the content of the communication. Speech related to political issues or matters of "public concern" is constitutionally equal to speech concerning one's employment or neighbors, so long as that speech is not an abuse of the right. *See State v. Robertson,* 293 Or 402, 435, 649 P2d 569 (1982) ("The right of free expression is as important to many people in their personal and institutional relationships as it is in the narrower 'civil liberties' related to politics, and nothing in

Article I, section 8, suggests that it is limited to the latter."). The Oregon Constitution does not recognize hierarchies of speech defaming someone, based on that person's access to the means of rebutting the defamation. The Oregon Constitution does not require a higher standard of proof in a defamation action where the plaintiff is a "public figure" rather than a "private individual."

Article I, section 8 does not provide the media with any protection not available to other citizens. It is settled Oregon law "that in the absence of a statute, newspapers as such have no peculiar privilege but are liable for what they publish in the same manner as the rest of the community."[4] *Kilgore v. Koen*, 133 Or at 7 (rule consistent with the "liberty of the press" guaranteed by federal and state constitutions); *see Wheeler v. Green*, 286 Or 99, 117-18, 593 P2d

777 (1979) (Oregon Constitution does not mention separately a "freedom of the press"); *see also State ex rel Oregonian Pub. Co. v. Deiz,* 289 Or 277, 287, 613 P2d 23 (1980) (Linde, J., concurring) ("Freedom of expression, in Oregon, does not single out the professional press."). For that reason, any standard of liability in defamation cases required by the Oregon Constitution should be the same for all defendants.

No Oregon Supreme Court case interprets the standard of liability under the Oregon Constitution in a defamation action.[5] However, *Wheeler v. Green, supra,* recognized that statements constituting defamation "have throughout the history of this state been recognized as an abuse of the right of free expression for which a person is to be held responsible under the provisions of Article 1,§8." 286 Or at 118.

Two recent cases have held that the common law standard of liability applies where the plaintiff is not a "public figure" and the defendant is not part of the media. *Wheeler v. Green, supra; Harley-Davidson v. Markley,* 279 Or 361, 568 P2d 1369 (1977).[6] These two decisions do not rest on the Oregon Constitution, but they are supported by Article I, section 10, which provides for "remedy by due course of law for injury [to] reputation." This provision does not require any certain standard of liability in defamation actions, *see Davidson v. Rogers,* 281 Or 219, 574 P2d 624 (1978), but it does mandate "remedy by due course of law." The remedies provided during over a century of development of the common law of libel and slander, whether using a standard of actual malice or liability without fault, and the defenses developed by common law and provided for by statute,

see ORS 30.160, are entitled to constitutional respect. We will not substitute a constitutional standard of liability, applicable in all cases, based on our review of the instant case. The Oregon Constitution does not impose such a minimum standard of liability.

Defendants also argue that the First Amendment to the United States Constitution[7] requires a standard of liability higher than liability without fault in defamation actions. We agree to the extent that if the plaintiffs are "public figures" for purposes of federal constitutional analysis, plaintiffs must prove the false and defamatory statements were published with actual malice; *i.e.*, knowledge of falsity or reckless disregard of truth. *New York Times v. Sullivan*, 376 US 254, 84 S Ct 710, 11 L Ed 2d 686 (1964); *see St. Amant v. Thompson*, 390 US 727, 731, 88 S Ct 1323, 20 L Ed 2d 262

(1968) ("high degree of awareness of *** probable falsity"). If the plaintiffs are not "public figures" and the defendants are part of the media, plaintiffs must prove that the false and defamatory statements were made negligently. *Gertz v. Robert Welch, Inc.*, 418 US 323, 94 S Ct 2997, 41 L Ed 2d 789 (1974); *see supra* note 6.

We must first determine whether plaintiffs are "public figures" under federal caselaw interpreting the first amendment in defamation cases. The Supreme Court of the United States first addressed this concern in the consolidated cases of *Curtis Publishing Co. v. Butts*, 388 US 130, 87 S Ct 1975, 18 L Ed 2d 1094 (1967), and *Associated Press v. Walker*, 388 US 130, 87 S Ct 1975, 18 L Ed 2d 1094 (1967). The Court held that the privately employed athletic director and former coach of the University of Georgia

football team (Butts) and a retired general who had actively participated in disturbances surrounding the admission of James Meredith to the University of Mississippi (Walker) were both "public figures." The Court stated:

> "Butts may have attained that status by position alone and Walker by his purposeful activity amounting to a thrusting of his personality into the 'vortex' of an important public controversy, but both commanded sufficient continuing public interest and had sufficient access to the means of counterargument argument to be able 'to expose through discussion the falsehood and fallacies' of the defamatory statements."

388 US at 155.

Gertz v. Robert Welch, Inc., supra, determined that an attorney who represented the family of a boy slain by a police officer was not a public figure. The Court reiterated its two-pronged standard for public figures and stated:

> "Absent clear evidence of general fame or notoriety in the community, and pervasive involvement in the affairs of society, an individual should not be deemed a public personality for all aspects of his life. It is preferable to reduce the public-figure question to a more meaningful context by looking to the nature and extent of an individual's participation in the particular controversy giving rise to the defamation."

418 US at 352. *See Time, Inc., v. Firestone,* 424 US 448, 96 S Ct 958, 47 L Ed 2d 154 (1976).

In *Hutchinson v. Proxmire,* 443 US 111, 99 S Ct 2675, 61 L Ed 2d 411 (1979), the Court established that the public controversy into which plaintiff may thrust his or her personality must pre-exist the defamatory publication. 443 US at 135. It cannot be created by the publication. Likewise in *Wolston v. Reader's Digest Ass'n, Inc.,* 443 US 157, 99 S Ct 2701, 61 L Ed 2d 450 (1979), the Court

held that merely because events involving a private individual attract public and media attention dos not transform that private individual into a public figure. 443 US at 167.

Defendants concede that no such pre-existing public controversy was present in the instant case. Those cases cited by defendants and amici which hold a business entity to be a public figure based on analysis of a thrusting into the vortex of a public controversy are inapposite. *See National Foundation for Cancer Research v. Council of BBB*, 705 F2d 98 (4th Cir), *cert. denied* 104 S Ct 108 (1983); *Steaks Unlimited, Inc. v. Deaner*, 623 F2d 264 (3d Cir 1980); *Trans World Accounts, Inc. v. Associated Press*, 425 F Supp 814 (ND Cal 1977); *American Ben. Life Ins. Co. v. McIntyre*, 375 So 2d 239 (Ala 1979) (on rehearing). There simply is no public controversy into which plaintiffs

arguably thrust themselves. Merely opening one's doors to the public, offering stock for public sale, advertising, etc., even if considered a thrusting of one's self into matters of public interest, is not sufficient to establish that a corporation is a public figure. *See Golden Bear Distr. Systems v. Chase Revel, Inc.*, 708 F2d 944 (5th Cir 1983); *Bruno & Stillman, Inc. v. Globe Newspaper Co.*, 633 F2d 583 (1st Cir 1980); *Artic Co., Ltd. v. Loudoun Times Mirror*, 624 F2d 518 (4th Cir 1980), *cert. denied* 449 US 1102 (1981); *Vegod Corp. v. American Broadcasting Companies*, 25 Cal 3d 763, 160 Cal Rptr 97, 603 P2d 14 (1979). Cases holding the opposite have been impliedly renounced by the Supreme Court's decisions in *Hutchinson* and *Wolston*. *See, e.g., Reliance Ins. Co. v. Barron's*, 442 F Supp 1341 (SDNY 1977) (relying in part on district court decisions in *Hutchinson* and

Wolston later reversed by Supreme Court). Neither plaintiff is a limited purpose "public figure."

Defendants argue that the Bank of Oregon is an all purpose "public figure." Three cases, supported by entirely different rationales, support this argument. *Martin Marieta Corp. v. Evening Star Newspaper,* 417 F Supp 947 (DDC 1976), concluded that corporations are public figures *per se,* and that the *Gertz* analysis of the public figure question does not apply to a corporation because it is based on the individual's personal reputation and the essential dignity and worth of every human being. 417 F Supp at 955. The Court applied the public interest standard of *Rosenbloom v. Metromedia,* 403 US 29, 91 S Ct 1811, 29 L Ed 2d 296 (1971), and thus found that defamatory statements made of a corporate plaintiff in a matter of public concern

would be afforded the protection of the *New York Times* actual malice standard. This rationale is intriguing, but it should be rejected for the same reason that *Rosenbloom* was rejected by subsequent U.S. Supreme Court decisions: it involves courts in determinations of whether speech is of public concern or interest to too great an extent. *Dairy Stores, Inc. v. Sentinel Pub. Co., Inc.*, 191 NJ Super 202, 465 A2d 953 (1983), rejected the public figure analysis where the plaintiff is a corporation, and based its determination that the actual malice standard applies on an independent first amendment right to commercial and consumer information and the concomitant media right to convey such information. This analysis is not supported by federal defamation caselaw and for that reason will not be applied herein. *Coronado Credit Union v. KOAT Television*, 99 NM 233, 656 P2d 896 (Ct App

1982), considered a financial institution to be a public figure because that institution served the public, was regulated by state and federal authorities, and engaged in activities of interest to the public, which were of public concern. To the extent that the court held Coronado Credit Union to be an all purpose public figure, we reject its analysis in favor of a stricter application of the *Gertz* standard, which we believe is applicable and may be satisfactorily applied to a plaintiff which is a business entity. The Bank of Oregon does not present that "exceedingly rare" instance of an entity which is a public figure for all purposes. We find that the bank does not have "general fame or notoriety" in the community in which the article was published nor does it exhibit "pervasive involvement in the affairs of society."

Defendants also argue that Wadsworth is an all purpose public figure. We agree with the Court of Appeals that this argument is "patently unmeritorious," especially in light of the recent emphasis on the limited purpose public figure analysis by the Supreme Court of the United States. Cases cited by defendants and amici in support of this argument are not helpful or persuasive. *See Ryan v. Brooks,* 634 F2d 726 (4th Cir 1980)(dicta); *Miller v. Transamerican Press, Inc.,* 621 F2d 721 (5th Cir 1980) (no analysis), *cert. denied* 450 US 1041 (1981); *Carey v. Hume* 390 F Supp 1026 (DDC 1975) (admitted) *aff'd* 543 F2d 1389 (DC Cir 1976).

Because neither plaintiff is a "public figure," the *New York Times* actual malice standard, knowledge of falsity or reckless disregard for truth, is not applicable in the instant case.

Therefore, we reach the other portion of *Gertz v. Robert Welch, Inc., supra,* which established that a state could not impose liability without fault on a media defendant, even where the plaintiff was a "private individual." There is no question that each of the defendants in the instant case is a media defendant, entitled without doubt to the protection provided in *Gertz*. In order to protect the first amendment rights of the instant defendants, plaintiffs must prove that the false and defamatory statements were made negligently, *i.e.*, without due care to ascertain whether they were true. In addition, *Gertz* mandates that "[i]t is necessary to restrict defamation plaintiffs who do not prove knowledge of falsity or reckless disregard for the truth to compensation for actual injury." 418 US at 349. The Court stated that "actual injury is not limited to out-of-

pocket loss" but includes "impairment of reputation and standing in the community, personal humiliation, and mental anguish and suffering." 418 US at 350.

The standard of care for those allegedly defamatory statements that require proof of negligence should be ordinary negligence, neither gross negligence as suggested by the trial judge nor the care of a reasonably prudent, careful and skillful journalist as held by the Court of Appeals. We agree with the Court of Appeals, however, that comparison of defendant's conduct to a community standard is but one factor in determining whether the standard of care has been met. It remains possible that behavior which conformed to local practice would nevertheless be negligent.

Because plaintiffs need to prove that defendants were negligent in publishing the article, the trial court's

denial of plaintiffs' motion to amend the complaint on the ground that negligence was not the proper standard was incorrect. Although the motion was also challenged on the basis that it was untimely, in determining the extent of a trial judge's ruling, we look to the order issued to dispose of the motion. *See State v. Swain/Goldsmith,* 267 Or 527, 530, 517 P2d 684 (1974). The order denying the motion to amend unequivocally was based on legal sufficiency, not timeliness. In any event, the transcript of the oral hearing shows that the ruling on the ground of legal sufficiency was made at defendant's request so that the resultant order could be appealed. It would be a strange result for this court to find, after that appeal process was complete, that the motion generating it was untimely. The motion to amend the complaint was incorrectly denied.[8]

Summary judgment is proper only where there is no "genuine issue as to any material fact for trial." ORCP 47D. Summary judgment for defendant should only be granted where the trial court is convinced that defendant's conduct meets the applicable standard of liability. *Uihlein v. Albertson's, Inc.*, 282 Or 631,637, 580 P2d 1014 (1978). Because the standard of liability for at least some of the allegedly defamatory statements is negligence, summary judgment was not proper in the instant case. The trial judge expressly realized that if negligence were the standard, summary judgment was inapplicable. He stated: "There are facts to support ordinary negligence, but ordinary negligence is not the standard of liability ***." There is no merit to the contention that summary judgment was nevertheless proper because defendants presented uncontroverted

expert evidence that defendants were not negligent. *See W. R. Chamberlin & Co. v. Northwestern Agencies,* 289 Or 201, 207, 611 P2d 652 (1980); *cf. Jones v. Jones,* 276 Or 1125, 557 P2d 239 (1976) (testimony of experts is received and weighed with caution).

The decision of the Court of Appeals is affirmed and the case is remanded to the circuit court.

ROBERTS, J., concurring in part, dissenting in part.

I concur with the majority's analysis under the state constitution that Article I, section 8 provides no greater protection to media defendants as compared to other defendants. I also agree that Wadsworth is not a "public figure" for purposes of the federal constitutional analysis. I dissent, however, with regard to the Bank of Oregon. The bank meets the requirements

of a "public figure" as that term has developed in federal dafamation (sic) jurisprudence.

The United States Supreme Court has held that media defendants enjoy a conditional constitutional immunity from liability for publication of defamatory falsehoods. *New York Times Co. v. Sullivan*, 376 US 254, 84 S Ct 710, 11 L Ed 2d 686 (1964). The conditional immunity applies if the defamatory statements concern public officials, *New York Times Co.*, or public figures, *Gertz v. Robert Welch, Inc.*, 418 US 323, 94 S Ct 2997, 41 L Ed 2d 789 (1974). In such cases, the plaintiffs must prove that the defaming defendants acted with malice. The federal Supreme Court has established the law of public and private plaintiffs with reference to individuals. It has not yet addressed the status of corporate plaintiffs. Lower federal courts, state courts and

commentators have addressed the topic, however, and their analysis is compelling.

In *Coronada Credit Union v. KOAT Television,* 99 NM 233, 656 P2d 896 (1982), the credit union was found to be a public figure because it was chartered by law to serve members of the public, it was regulated by state and federal law, and its financial condition, the topic around which the defamation centered, was a matter of concern to the public. *Coronado* relied on a discussion of a corporation's status in the context of defamation by Sack, *Libel, Slander, and Related Problems* §V.3.1.9. at 208 (1980):

> "It seems clear *** that any *publicly held* corporation is a 'public figure' for purposes of commentary about its corporate affairs. When a corporation 'goes public' by publicly offering its securities, it has taken a specific, voluntary action, the known result of which will be mandatory increased public scrutiny. The necessary consequence is publicity.

> "It is consistent with both First Amendment policy and the aims of federal and state securities laws for commentary about such corporations to be encouraged and protected. Corporations subject to regulation by state or federal authorities are similarly 'public,' again inviting public scrutiny by voluntarily entering such businesses. And corporations that have the requisite level of dealings with government agencies may be 'public figures' for that reason alone. (Emphasis in original.) (Footnotes omitted.)

American Ben. Life Ins. Co. v. McIntyre, 375 So 2d 239 (Ala 1979) (per curiam), held an insurance company to be a public figure with the following analysis:

> "We hold that an insurance company such as American Benefit is for purposes of our libel laws a 'public figure.' It cannot be successfully argued that a corporation whose dealings are subject to close regulation by our state government, and, indeed, whose very existence as an entity is owing to that government, does not invite attention and comment from the news media. The insurance business has long been held to be

> clothed with the private interest, *** and the power and influence of such a business over society cannot be ignored." 375 So 2d at 242. (Citation omitted.)

A commentator has examined the question of where corporations fit in the public vs private plaintiff analysis. She advocates the position that

> "the corporate defamation plaintiff more nearly resembles the public figure than its private counterpart. A corporation is inherently less vulnerable to reputational injury than an individual and can utilize political and commercial speech to build its image and discredit its detractors. In addition, a corporation has voluntarily assumed the unique trappings of the corporate business form and, through the more public and formalized character of its inception and operation, has assumed the risks of free debate." Fetzer, *The Corporate Defamation Plaintiff as First Amendment "Public Figure": Nailing the Jellyfish,* 68 Iowa L Rev 35, 49 (1982). (Footnotes omitted.)

This author examined a 1908

Kansas decision, the one cited in *New York Times Co. v. Sullivan, supra,* as the source of the public figure/private individual distinction. *Coleman v. MacLennan,* 78 Kan 711, 98 P 281 (1908), contains dictum indicating the scope of the public figure analysis. The case indicates that the analysis extends "to all officers and agents of government - municipal, state and national; to the management of all public institutions -educational, charitable and penal; to the conduct of all corporate enterprises affected with a public interest -transportation, banking, insurance, and to innumerable other subjects involving the public welfare." 78 Kan at 734.

Not suprisingly, a large insurance company with stocks traded on the New York Stock Exchange was held to be a public figure. *Reliance Insurance Co. v. Barron's,* 442 F Supp 1341 (SDNY 1977). The

court stated: "By its very nature as a large publicly held, government-regulated corporation, and additionally because of its voluntary decision to make a public stock offering, Insurance has, in fact, thrust itself into the public eye." 442 F Supp at 1349.

Martin Marietta Corp. v. Evening Star Newspaper, 417 F Supp 947 (D DC 1976), applied to the malice standard in a suit brought by the corporate plaintiff. The court found the corporation to be a public figure either in a limited sense because of the public controversy with which the corporation became involved, or in a broad sense because corporations are, for the most part, not deserving of the protections defamation law was meant to afford. First, the court analyzed *Rosenbloom v. Metromedia,* 403 US 29, 91 S Ct 1811, 29 L Ed 2d 296 (1971), a plurality opinion later rejected by a majority

opinion in *Gertz v. Robert Welch, Inc., supra.* *Rosenbloom* held that a plaintiff who is neither a public official nor a public figure could nonetheless be required to prove malicious defamation on the part of a media defendant if the falsehoods concerned an issue of public importance.

Rosenbloom's shift in focus from the public character of the plaintiff to the public character of the issue was cut short in *Gertz v. Robert Welch, Inc., supra.* *Gertz* involved a private plaintiff. The media defendant attempted to apply the *Rosenbloom* analysis to bring itself within the conditional constitutional privilege for matters of public interest. *Gertz* rejected this approach, reasoning that the reputation of private individuals requires a greater degree of protection than the reputation of public figures. This is because public figures have greater access to the media and are better

equipped to counteract false statements. Public figures also have voluntarily placed themselves into public issues. One consequence of such exposure is increased risk of injury from defamatory falsehoods. *Gertz* describes individuals as public figures as follows:

> "Hypothetically, it may be possible for someone to become a public figure through no purposeful action of his own, but the instances of truly involuntary public figures must be exceedingly rare. For the most part those who attain this status have assumed roles of especial prominence in the affairs of society. Some occupy positions of such persuasive power and influence that they are deemed public figures for all purposes. More commonly, those classed as public figures have thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved. In either event, they invite attention and comment." 418 US at 345.

It should be noted that the majority uses *Gertz's* reference to the rarity of "involuntary" public figures in

support for its agrument that the Bank of Oregon is not a public figure. Under my analysis, a corporation is considered a public figure because of its voluntarily assumed corporate activity.

The *Gertz* court found that the assumptions attributed to public figures are not justified with regard to private individuals.

> "[The private individual] has not accepted public office or assumed an 'influential role in ordering society.' *** He has relinquished no part of his interest in the protection of his own good name, and consequently he has a more compelling call on the courts for redress of injury inflicted by defamatory falsehood. Thus, private individuals are not only more vulnerable to injury than public officials and public figures; they are also more deserving of recovery." 418 US at 345. (Citation omitted.)

Martin Marietta concluded that *Gertz* did not apply to corporations and *Rosenbloom* was still controlling. The

inquiry then became whether the falsehoods concerned a matter of public interest. The court found that they did and applied the malice standard.

In some respects, the *Martin Marietta* analysis is unsound. Attempting to define a "matter of public interest" is a notoriously slippery undertaking that leads the court into the questionable practice of measuring the public worth of a particular publication. Its reliance on *Rosenbloom* to rekindle the dying embers of the "public interest" standard is not persuasive. Nonetheless, *Martin Marietta* accurately distills the focus of the *Gertz* test:

> "[T]he 'public figure' standards set out in *Gertz* are designed to ascertain whether a person, through his activities, has lost claim to his private life. It makes no sense to apply these standards to a corporation, which, regardless of its activities, never has a private life to lose." 417 F Supp at 955.

There are certain characteristics of corporations which provide an objective standard by which to categorize the public or private nature of the enterprise. The degree of government regulation imposed on a corporation is perhaps the single most important determinant. As government regulation increases, so does the corporation's overall exposure to public scrutiny. Exposure comes in the form of disclosure and reporting requirements, administrative inspections and audits, and compliance with rules and regulations of public record for conducting business. Often, extensively regulated corporations deal in such essential commodities as transportation, finance and insurance. Their efficient management cannot be a matter solely of private institutional concern.

Not all corporations would fit this "public figure" model. Corporations subject only to the regulations established by state law for corporate existence would not become public figures by virtue of such minimum regulation alone.

The resolution of more difficult cases lying between these two extremes may await further refinement and need not be considered here. Banking is a pervasively regulated business in which public scrutiny is the norm. Defendants' article questioned the integrity of certain financial transactions of plaintiff bank, a topic of which public review is anticipated. I would hold the Bank of Oregon to the requirement to prove malicious defamation, and, with regard to this plaintiff, affirm the trial court.

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[1]The trial judge equated gross negligence with reckless conduct. We are not certain that the two are equivalent in a defamation case but do not need to decide this issue to resolve this case.

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[2]*Kilgore v. Koen,* 133 Or 1, 288 P 192 (1930), suffers from the confusion which confounded judges and commentators for decades. Two different types of "malice" were involved in many libel actions. One type was the actual malice referred to in the text above. The other type was a legal fiction arising from pleadings alleging malice, as was necessary in *criminal* libel, which over time became considered essential to the civil action. *Prince v. Brooklyn Daily Eagle,* 16 Misc 186, 187, 37 NYS 250, 251-52 (Sup Ct 1896). When this legal fiction became troublesome, as when there was no conceivable malice on the part of the defendant, another legal fiction rode to its rescue. That legal fiction was that malice would be presumed or implied in most libel cases, *i.e.,* those in which the libelous statements were not privileged. *Coleman v. MacLennan,* 78 Kan 711, 98 P 281 (1908). In this spirit, we adopt the maxim that two contrasting legal fictions cancel each other. On balance, the common law standard of culpability in libel actions for statements not privileged was liability without fault. This is so in Oregon. *See Wheeler v. Green,* 286 Or 99, 593 P2d 777 (1979).

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[3]As this review is of summary

judgment for defendant, we assume the statements were false and defamatory. If any one of the 46 statements alleged by plaintiffs to be libelous was not privileged, under the common law summary judgment for defendant should not have been entered. Defendants claim that two distinct privileges obtain with respect to certain of the statements. They claim that certain statements were comments on judicial proceedings and thus privileged. *Peck* dictates that if such a claim is correct as a matter of law, the jury should be instructed accordingly. 122 Or at 422. Defendants also claim that certain statements were expressions of opinion based upon stated facts and thus are not actionable. If this claim is correct as a matter of law, the jury should be instructed accordingly.

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[4]Oregon statutes do distinguish between media defendants and others. *See, e.g.*, ORS 30.150 to 30.175. These statutes provide that a defamation plaintiff may not recover general damages against a media defendant unless a correction or retraction of the publication is demanded but not published or the defamation was intentional. This statutory requirement does not violate Article I, section 10 of the Oregon Constitution. *Davidson v. Rogers*, 281 Or 219, 574 P2d 624 (1978); *Holden v. Pioneer Broadcasting Co.*, 228 Or 405, 365 P2d 845 (1961).

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[5]*Wheeler v. Green*, 286 Or 99, 593 P2d 777 (1979), discussed the Oregon Constitution but only in the context of

damages. It established that punitive damages in defamation actions are prohibited by Article I, section 8, and not required by Article I, section 10.

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[6]The correctness of these decisions as a matter of *federal* constitutional law soon may be decided. The Supreme Court of the United States granted certiorari to review *Greenmoss Builders, Inc., v. Dun & Bradstreet, Inc.*, 143 Vt 66, 461 A2d 414 (1983). The Vermont Supreme Court, relying extensively on *Harley-Davidson v. Markley*, 279 Or 361, 568 P2d 1369 (1977), held that the federal constitution permitted a state to impose liability without fault if both plaintiff and defendant were "private individuals." The question presented is whether the rule in *Gertz v. Robert Welch, Inc.*, 418 US 323, 94 S Ct 2997, 41 L Ed 2d 789 (1974), prohibiting the state from imposing liability without fault on media defamation defendants, applies to "private" as well as media defendants.

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[7]This amendment provides in part:

> "Congress shall make no law *** abridging the freedom of speech, or of the press ***."

It is applicable to the states through the Fourteenth Amendment.

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[8]*Baker v. Brookmead Dairy, Inc.*, 230 Or 384, 386-87, 370 P2d 235 (1962), is

consistent with our ruling herein. In *Baker*, the transcript revealed that "the trial court also weighed the circumstances of the delayed tender and the defendants' failure to support their motion with an affidavit in explanation of such delay." 230 Or at 386. Thus, we reviewed the trial court's denial of a motion for a new trial for abuse of discretion because it was founded on mixed grounds of timeliness and legal sufficiency. In the instant case, we believe the trial judge meant to limit the denial to the stated ground (legal sufficiency) and abandoned any previous intention to deny the motion on the ground of lack of timeliness.

[Appendix B]

IN THE COURT OF APPEALS OF THE
STATE OF OREGON

BANK OF OREGON et al, Appellants, v. INDEPENDENT NEWS, INC. et al, Respondents.	)	A 7908-03679 CA A24067

Appeal from Circuit Court, Multnomah County.

Richard L. Unis, Judge.

Argued and submitted July 27, 1983.

Reversed and remanded, October 12, 1983.

RICHARDSON, P.J.

Plaintiffs in this libel action are Bank of Oregon and its president, Wadsworth. They allege that they were defamed by an article written by defendants Buel and Meeker and published in defendant Independent News, Inc.'s weekly newspaper Willamette Week. The article was based in the main on information furnished defendants by Richard Cross, a customer of the bank. A foreclosure action by the bank was pending against Cross at the time he gave the information to defendants. Defendants' article was to the general effect that plaintiffs had engaged in a series of wrongful acts to divert Cross's money and credit to another bank customer. Plaintiffs contend that defendants did not take adequate care to ascertain the truth or falsehood of Cross's charges before publishing them.

The trial court granted defendants' motion for summary judgment, and plaintiffs appeal from the resulting judgment. The principal issue is what level of culpability a plaintiff who is a "private individual" must prove against a "media defendant" to recover for libel.

The common law rule in Oregon and virtually all other jurisdictions is that defamations ascribing "to the defamed party characteristics or conduct that would adversely affect his fitness for his occupation or profession" are actionable *per se*. *Benassi v. Georgia-Pacific*, 62 Or App 698, 705, 662 P2d 760, *modified* 63 Or App 672, ___ P2d ___ (1983); *see also Cook v. Safeway Stores, Inc.*, 266 Or 77, 511 P2d 375 (1973); *Murphy v. Harty*, 238 Or 228, 393 P2d 206 (1964). Accordingly, a presumption of malice and of general damage to reputation arises from the making of the defamation alone, and direct

proof of culpability on the part of the defendant is unnecessary. *Woolley v. Hiner*, 164 Or 161, 165, 100 P2d 608 (1940); *Peck v. Coos Bay Times Pub. Co. et al.*, 122 Or 408, 259 P 307 (1927); *see Gertz v. Robert Welch, Inc.*, 418 US 323, 346-47, 349, 94 S Ct 2997, 41 L Ed 2d 789 (1974).[1]

However, a series of United States Supreme Court decisions, beginning with *New York Times Co. v. Sullivan*, 376 US 254, 84 S Ct 710, 11 L Ed 2d 686 (1964), hold that the First Amendment requires more of a showing of culpability than the common law does to support a judgment for libel, including one against a media defendant (*e.g.*, a publisher or broadcaster). The Court held in *New York Times* that a public official cannot recover

> "* * * damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice'-that is, with knowledge that it was

> false or with reckless disregard of whether it was false of [sic] not.* * *" 376 US at 279-80.

Although it is not wholly clear from the *New York Times* opinion, later statements by the Supreme Court indicate that the "reckless disregard" part of the actual malice test is a subjective rather than an objective standard. *See St. Amant v. Thompson,* 390 US 727, 731, 88 S Ct 1323, 20 L Ed 2d 262 (1968) (statement must be made with "high degree of awareness *** of probable falsity," and defendant must have "entertained serious doubts as to the truth of his publication").

In *Curtis Publishing Co. v. Butts,* 388 US 130, 87 S Ct 1975, 18 L Ed 2d 1094 (1967), the Court extended the actual malice standard to libel actions by "public figures" against media defendants. Four years later, a plurality of the Court concluded in *Rosenbloom v. Metromedia,* 403 US 29, 91 S Ct 1811, 29 L Ed

2d 296 (1971), that the actual malice rule applies even to actions by "private individuals" (*i.e.*, persons who are not public officials or public figures) if the subject of the defamation is one "of public or general interest." 403 US at 43. In *Gertz v. Robert Welch, Inc., supra,* the Court rejected the plurality's conclusion in *Rosenbloom* and held

> "* * * that, so long as they do not impose liability without fault, the States may define for themselves the appropriate standard of liability for a publisher or broadcaster of defamatory falsehood injurious to a private individual. * * *" 418 US at 347.

The principal rationale for *New York Times* is that, in the context of political debate and communication about public officials, the First Amendment requires that erroneous statements "must be protected if the freedoms of expression are to have the 'breathing space' that they 'need . . . to survive.'" 376 US at

271-72 (citing *N.A.A.C.P. v. Button*, 371 US 415, 433, 83 S Ct 328, 9 L Ed 2d 405 (1963)). That premise has been adhered to in the Supreme Court's later cases. The Court said in *Gertz* that "[t]he First Amendment requires that we protect some falsehood in order to protect speech that matters." 418 US at 341. However, the Court concluded in *Gertz* that the appropriate balance between First Amendment protection of the media and the right of redress for libel differs when those defamed are private individuals rather than public officials or public figures. The Court explained:

> "More important than the likelihood that private individuals will lack effective opportunities for rebuttal, there is a compelling normative consideration underlying the distinction between public and private defamation plaintiffs. An individual who decides to seek governmental office must accept certain necessary consequences of that involvement in public affairs. He runs the risk of closer public scrutiny

> than might otherwise be the case. And the society's interest in the officers of government is not strictly limited to the formal discharge of official duties.* * *
>
> "* * * * *
>
> "* * * [T]he communications media are entitled to act on the assumption that public officials and public figures have voluntarily exposed themselves to increased risk of injury from defamatory falsehood concerning them. No such assumption is justified with respect to a private individual. He has not accepted public office or assumed an 'influential role in ordering society.' * * * He has relinquished no part of his interest in the protection of his own good name, and consequently he has a more compelling call on the courts for redress of injury inflicted by defamatory falsehood. Thus, private individuals are not only more vulnerable to injury than public officials and public figures; they are also more deserving of recovery." 418 US at 344-45.[2] (Citation omitted.)

The only First Amendment *requirement* relevant to this appeal is that, in a libel action by a private

individual against a media defendant, the plaintiff must prove that the defendant was at least negligent in failing to ascertain whether the defamatory publication was true or false.[3] The states *may* establish a higher standard of liability. Plaintiffs argue that negligence is the appropriate standard; defendants argue that the *New York Times* actual malice standard should apply. In granting defendants' motion for summary judgment, the trial court adopted a "gross negligence" standard; as defined by the trial court, that standard is in effect the *New York Times* rule, modified by an objective rather than a subjective definition of "reckless disregard."

Before we turn to the principal issue, two preliminary matters must be addressed. First, defendants argue that plaintiffs are public figures and are therefore subject to the actual malice

standard, regardless of whether that standard applies in libel actions by private individuals.[4] The trial court concluded that plaintiffs are not public figures. We agree.

In *Wheeler v. Green,* 286 Or 99, 111-17, 538 P2d 777 (1979), the Oregon Supreme Court traced the development of the public figure doctrine from *Curtis Publishing Co. v. Butts, supra,* through *Time, Inc. v. Firestone,* 424 US 448, 96 S Ct 958, 47 L Ed 2d 154 (1976), and demonstrated that the United States Supreme Court had narrowed the public figure category substantially in the later cases. It is unnecessary to repeat that demonstration here, but we do note that the narrowing trend described in *Wheeler* has continued in the United States Supreme Court's and most other courts' decisions subsequent to *Wheeler.*

Defendants argue that the bank "has been drawn into a controversy about its operations" and that

> "Plaintiff Bank contends in part that it cannot be considered a public figure because it has not 'voluntarily[injected itself] . . . into a particular public controversy,' *Gertz v. Robert Welch, Inc., supra,* 418 US at 351, 93 S Ct 3013, 41 L Ed 2d at 812. However, Plaintiffs fail to acknowledge that voluntary injection into public controversy is not the only means of attaining public figure status. *Gertz* also recognizes that a person may become a public figure for a limited range of issues by virtue of having been 'drawn into a particular public controversy.' *Id.* at 351. * * *"

Whatever distinction the Court may have intended between an "individual voluntarily inject[ing] himself" into a controversy and his being "drawn into" one, the Court's ultimate explanation for holding that Gertz was not a public figure makes no reference to involuntary involvement in public controversies. It said:

> "* * * [Gertz] plainly did not thrust himself into the vortex of this public issue, nor did he engage the public's attention in an attempt to influence its outcome. * * *" 418 US at 352.

In any event, it is clear that a defamatory statement in itself cannot make the defamed person a public figure by reason of the controversy the defamation engenders. *See Hutchinson v. Proxmire,* 443 US 111, 135, 99 S Ct 2675, 61 L Ed 2d 411 (1979); *Bruno & Stillman, Inc. v. Globe Newspaper Co.,* 633 F2d 583 (1st Cir 1980). We find nothing in the record to suggest that the bank has been drawn into any controversy except the one created by defendants' publication.

Defendants also argue that the bank is a public figure because it is a "large publically held banking corporation" that is subject to extensive federal and state regulation. We conclude that the bank, like the corporate

plaintiff in *Bruno & Stillman, Inc. v. Globe Newspaper Co., supra,* is a "paradigm middle echelon, successful" business, 633 F2d at 592, and is not a public figure by reason of engaging in that business, being subject to the routine or usual regulation of that business or being incorporated. *See Bruno & Stillman, Inc. v. Globe Newspaper Co., supra,* 633 F2d at 586-92; *Vegod Corp. v. American Broadcasting Company, Inc.,* 25 Cal 3d 763, 160 Cal Rptr 97, 603 P2d 14 (1979), *cert den* 449 US 886 (1980).[5]

Defendants' final basis for contending that the bank is a public figure is that its size and concomitant ability "to respond to accusations against it" make it one. Defendants' argument is based on language in *Gertz:*

> "* * * Public officials and public figures usually enjoy significantly greater access to the channels of effective communication and hence have a more realistic opportinity to counteract false statements than private individuals normally

> enjoy. Private individuals are therefore more vulnerable to injury, and the state interest in protecting them is correspondingly greater." 418 US at 344. (Footnote omitted.)

Defendants' argument simply postulates that the bank has "access to * * * channels of effective communication" of the kind public figures enjoy. We find and defendants point to nothing in the record that convinces us the bank has any exceptional capacity to excite or procure the attention of any media outlet other than defendants' newspaper. The "access to * * * channels of * * * communication" discussion in *Gertz* describes a consequence of being a public figure. There can be cases where the plaintiff's extraordinary access to the media is a factor to weigh in determining whether the plaintiff is a public figure, *see Hutchinson v. Proxmire, supra,* 443 US at 136, but this is not such a case, because there is nothing to weigh.

Defendants' arguments for finding the bank to be a public figure are not persuasive, individually or collectively. Their independent arguments that Wadsworth is a public figure are patently unmeritorious. Both plaintiffs are "private individuals."

The second preliminary matter is whether plaintiffs are entitled to argue here that negligence is the appropriate standard of culpability, given the facts that they alleged only actual malice and that the trial court denied their motion for leave to amend their complaint to allege negligence. The trial judge denied the motion after he had concluded that gross negligence was the standard of liability. The question is whether the denial of the motion was based *solely* on that substantive conclusion and on the court's resulting view that an amended complaint alleging ordinary

negligence would not state a claim, or whether the denial was also based in part on a discretionary decision that the motion should not be allowed because of the late stage in the proceedings at which it was made. The answer to that question determines whether we may review the trial court's substantive conclusion or may only review the ruling on the motion only for an abuse of discretion. *See Baker v. Brookmead Dairy, Inc. et al,* 230 Or 384, 386-88, 370 P2d 235 (1962).

The trial court's written order denying the motion was clearly predicated only on the substantive issue. It states that

> "* * * plaintiffs' motion to amend their complaint to allege negligence is denied because negligence is not a proper basis of liability in this defamation case between a private plaintiff and a media defendant involving an issue of public importance."

It is not *as* certain from the court's

colloquy in argument with counsel that the substantive issue was the sole basis for the ruling. Early in that colloquy, the judge indicated that he would deny the motion because he regarded it as untimely. Plaintiffs' attorney then spoke at length, urging the court to change the ruling. The following exchange then took place between the court and counsel for the parties:

> "THE COURT: Suppose I deny the motion to amend and the reason I deny it is for the same reason Judge Crookham struck in another case a pleading which had a negligence [allegation,] because he felt in that case that actual malice was the standard. And suppose I allow the amendment and then struck it?
>
> "MR. BROWN [Defendants' counsel]: * * * Your Honor, there are four factors that the Courts consider when they decide they're going to allow an Amended Complaint or not to allow it; and two of them have to do with whether there was a delay, what the reason or cause for delay, and * * * whether there was prejudice to a non-moving party.

"And other factors the courts look to is does the claim, the amendment state a claim for relief, would the * * * party be entitled to relief upon the amended allegation.

"And perhaps Your Honor could use that rationale in denying it.

"THE COURT: On the basis they didn't state whether it was true or false; is that what you're saying"

"MR. BROWN: On the basis that the negligence allegation does not state a claim for relief.

"THE COURT: Yes.

"MR. BROWN: And therefore you're not going to allow that the allegation be pleaded at this point and perhaps that would take care of Mr. Jolles' [plaintiffs' counsel] problem because he could go up [on appeal].

"MR. JOLLES: Not state a claim for relief because negligence is not a proper standard.

"MR. BROWN: Mr. Jolles could go up on an appeal and say, yes it does.

"THE COURT: That seems a workable solution. All right.

"MR. JOLLES: I don't want anybody to think I agree with it.

> "THE COURT: No, I appreciate it.
>
> "All right, gentlemen, I feel that - let me tell you that I will not allow the motion to amend because I believe that the Amended Complaint does not state a basis for claim of relief in that * * *.
>
> "The Court is of the view that ordinary negligence is not the standard of liability in a media defamation case in this state. * * *" (Emphasis supplied.)

Defendants now argue, *inter alia,* that we should uphold the trial court's denial of the motion to amend because the ruling properly could have been based on the untimeliness of the motion and it would not have been an abuse of the judge's discretion to deny the motion on that ground. Defendants rely on *Baker v. Brookmead Dairy, Inc. et al, supra,* in which, according to defendants,

> "* * * [the] defendants filed a motion for leave to amend their answer four days before trial. The court denied the motion, principally on the mistaken belief that the amended

> answer did not allege facts sufficient to constitute a defense. Nevertheless, the ruling was affirmed on appeal."

In *Baker*, however, the Supreme Court concluded that the denial of the motion to amend was *in fact* based on its untimeliness, as well as on the putative insufficiency of the tendered answer, and that the scope of appellate review was *therefore* confined to whether the trial judge abused his discretion by denying the motion on grounds of untimeliness. *See* Or at 386-88. Here, we conclude that the sole basis for the denial of the motion was the trial court's conclusion that the amended complaint would not state a claim because a higher standard of liability than negligence had to be pleaded and proved.

It is true that, early in his discussion with counsel, the trial judge expressed the view that the motion to

amend should be denied on the ground of untimeliness. However, it is clear that the court completely abandoned that basis for denying the motion during the course of the colloquy. As the quoted portion of the record shows, the court ultimately accepted the suggestion of *defendants'* attorney to decide the motion in such a way that the substantive issue would be preserved and plaintiffs "could go up on an appeal" and argue that negligence is the proper standard of liability. The fact that the later written order sets forth only the substantive reason for denying the motion demonstrates further that the court intended to base its ruling *wholly* on the ground that the negligence theory of the proffered amendment was insufficient to state a claim. *See State v. Swain/Goldsmith,* 267 Or 527, 517 P2d 684 (1974). Accordingly, whether the court erred by denying the motion to amend and

whether the applicable standard of culpability is negligence or something higher are overlapping questions. We turn to the second.

Both parties contend that existing Oregon law requires the adoption of the respective standards of liability they advocate. Defendants argue that *Post v. Oregonian Publishing Co.*, 268 Or 214, 519 P2d 1258 (1974), is controlling. In that case, the plaintiff was wrongly identified as a drug smuggler in a news story published by the defendant. *Post* was decided three months before the United States Supreme Court decided *Gertz*. After noting that the defendant did not contend that the news story in question was not "about a subject of public or general interest," 268 Or at 220, and addressing certain other issues not relevant here, the court in *Post* held that the actual malice standard was applicable, as

Rosenbloom v. Metromedia, Inc., supra, then required. In our view, *Post* was simply an application of then-controlling United States Supreme Court authority. It is not dispositive here independently of that authority, and *Rosenbloom* is of course no longer authoritative.

Plaintiffs argue that the negligence standard is compelled by existing law. They reason that the Oregon decisions permit libel to be proved without direct evidence of culpability; that, in light of *Gertz,* the First Amendment requires only proof of negligence for a private individual to recover against a media defendant; that the Oregon Constitution does not require proof of greater culpability; and, therefore, that libel may be proved under these circumstances by establishing the common law elements plus negligence. However, whether the Oregon Constitution

requires more than the minimum *Gertz* standard is an open question and one about which the parties and the amici disagree.[6]

The relevant Oregon constitutional provisions are Article I, sections 8 and 10. Section 8 provides:

> "No law shall be passed restraining the free expression of opinion, or restricting the right to speak, write, or print freely on any subject whatever; but every person shall be responsible for the abuse of this right.-"

Section 10 provides:

> "No court shall be secret, but justice shall be administered, openly and without purchase, completely and without delay, and every man shall have remedy by due course of law for injury done him in his person, property, or reputation.-"

Plaintiffs contend that those provisions, with the guarantee in one of a remedy for injury to reputation and the caveat in the other that everyone is responsible for abuse of communicative rights, afford more of a right of redress

and less insulation for defamatory speech than does the First Amendment. Plaintiffs also note that, unlike the First Amendment, the Oregon speech provision "does not mention separately the 'freedom of the press' and so does not provide support for any distinction between private individuals and members of the media." *See Wheeler v. Green, supra,* 286 Or at 117-18. Defendants argue that Article I, section 8 has been construed to provide "a larger measure of protection to free expression" than the First Amendment, citing *Deras v. Myers,* 272 Or 47, 64, n 17, 535 P2d 541 (1975). Defendants also point to language of comparable import in *State v. Robertson,* 293 Or 402, 649 P2d 569 (1982) (relating to criminalization of certain speech by the coercion statute, ORS 163.275), and to the fact that the Oregon Supreme Court has interpreted the state constitution as

precluding punitive damages for defamation and other speech-related torts. *Wheeler v. Green, supra; Hall v. The May Dept. Stores,* 292 Or 131, 637 P2d 126 (1981). Defendants conclude:

> "Accordingly, where the First Amendment requires at least negligence in a defamation action against a media defendant, and where the Oregon Constitution has been held to provide a greater degree of protection than the First Amendment, the claim by Plaintiffs that the Oregon Constitution *requires* a negligence standard is utterly untenable. Instead, Article I, section 8 supports a higher standard than the minimum standard of negligence required by *Gertz."* (Emphasis defendants.)

Deras v. Myers, supra, and *State v. Robertson, supra,* dealt with the constitutionality of statutes *prohibiting or criminalizing* communicative activity. In *Robertson,* the court differentiated between the prohibition of speech and the provision of a remedy for injuries caused by speech. It noted:

> "As to providing a remedy for harm done by the impact of words as such, article I, section 8 does not immunize a speaker or writer against civil liability to another person 'by due course of law for injury done him in his person, property, or reputation,' as provided in article I, section 10, when the injurious words qualify as an 'abuse' of freedom of expression for which one can be held 'responsible' within the meaning of section 8. *See Hall v. May Dept. Stores Co.*, 292 Or 131, 637 P2d 126 (1981) (tortious infliction of emotional distress by verbal intimidation and threats), *Wheeler v. Green, supra,* n. 9 (defamation), *Turman v. Central Billing Bureau, Inc.*, 279 Or 443, 568 P2d 1382 (1977) (abusive debt collection methods)." 293 Or at 433, n 29.

Deras and *Robertson* do not assist defendants.

Neither does *Wheeler v. Green, supra,* or *Hall v. The May Dept. Stores, supra.* In *Wheeler,* the court held that Article I, section 10 does not require the availability of punitive damages in defamation cases, and that their recoverability would violate Article I, section 8 because they

> * * * can easily inhibit the exercise of freedom of constitutionally protected expression, as well as its abuse. * * *" 286 Or at 119.

However, *Wheeler* also holds that the remedy of *compensatory* damages for injury to reputation is not proscribed by Article I, section 8 and is protected by Article I, section 10. 286 Or at 118. The court later explained in *May:*

> "* * * The principle of the holding [in *Wheeler*], as stated above, was that punitive damages by definition go beyond whatever financial recompense is proper to compensate a plaintiff for the injury suffered by the plaintiff personally. Where such damages beyond any actual injury are allowable, the plaintiff collects them as a form of public punishment, not by virtue of a personal entitlement to compensation. When the cause of defendant's liability is his 'abuse' of speech and expression, as in the case of defamation, *Wheeler v. Green* holds that the 'responsibility for the abuse' is confined to civil liability for compensation only. * * *" 292 Or at 146.

In *Davidson v. Rogers,* 281 Or

219, 574 P2d 624 (1978), the court held that the retraction statute, ORS 30.160,[7] does not violate Article I, section 10. *See also Holden v. Pioneer Broadcasting Co. et al,* 228 Or 405, 365 P2d 845 (1961). Speaking for a plurality of the court in *Davidson,* Judge Holman stated:

> "* * * The language of the constitution does not specify that the remedy need be the same as was available at common law at the time of the adoption of the constitution; and the statute, while restricting the remedy, does not abolish the cause of action. Even though a retraction is not requested, the right of action still exists for an intentional defamation and, in any event, for recovery of specific demonstrable economic loss. Such a limitation is not violative of Art. I, § 10, for the reason that it does not wholly deny the injured party a remedy for the wrong suffered. * * *
>
> "In addition, the legislature has made available a retraction as a substitute for the remedy which the law would otherwise have provided. * * *" 281 Or at 221-22.

Judge Lent, joined by one other judge, dissented in *Davidson*. Judge Linde, also joined by one other judge, concurred. He disagreed with the conclusion of the lead opinion that the retraction statute provided a "substitute legal remedy." 281 Or at 224. He stated, however:

> "* * * [T]he validity of ORS 30.160 does not rest on the contingency of a retraction. The statute does not withdraw the common-law action for defamation. It limits the financial scope of the remedy, at least for unintentional defamation, to a measure of damages that corresponds to injuries measurable in money.
>
> "We need not pursue here the question how far the legislature must retain money damages as a constitutionally required remedy for noneconomic injuries when they existed at common law. Defamation is a special case, addressed by more than one provision of article I, Oregon's Bill of Rights. The focus of section 10 is on assuring a remedy to one whose reputation has been injured. At the same time, article I, section 8, forbids all laws 'restraining the free expression of opinion, or restricting the right to speak, write, or print

freely on any subject whatever,' with the proviso that 'every person shall be responsible for the abuse of this right.' The two sections must be construed together. They yield a coherent view of freedom and responsibility. The responsibility prescribed in section 8 is responsibility to others for injuries done to them, such as the injury to reputation accorded constitutional stature in section 10. Laws limited to remedying such injuries alone are not laws restraining the free expression of opinion, or restricting the right to speak, write, or print freely on any subject whatever. Laws that in terms impose sanctions on speech or writing beyond the needs of remedying such injuries, whether statutory or common law, are restraints and restrictions forbidden by section 8. *See Deras v. Myers, 272 Or 47, 535 P2d 541 (1975). Given the interrelation of our two explicit sections on freedom of speech and press and the right to a remedy for injury to reputation, a statute that matches financial compensation for unintentional defamation to demonstrable injuries measurable in money arguably exhausts the scope of that remedy under article I, section 8. In any event, it satisfies article I, section 10." 281 Or at 224-25.*

See also Gertz v. Robert Welch, Inc., supra,

418 US at 348-50 (holding that, under the First Amendment, where there is no proof of actual malice, damages are limited to "actual injury," which excludes punitive damages but "is not limited to out-of-pocket loss").

Wheeler and *Davidson* relate specifically to kinds of damages in defamation cases which, respectively, cannot constitutionally be imposed and may constitutionally be limited. However, the opinions in those cases illustrate generally the tension between the two Oregon constitutional provisions and the balancing efforts the Oregon Supreme Court has undertaken in applying the provisions to defamation actions.

No previous Oregon appellate decisions deals specifically with whether Article I, section 8 requires that a particular level of culpability be shown in libel cases, or whether Article I,

section 10 precludes such a requirement. We agree with plaintiffs that the language of the two sections does not support defendants' view that the Oregon Constitution requires a showing of greater culpability against a media defamation defendant than does the First Amendment. Article I, section 8 expressly provides that every person is responsible for abuses of communicative rights; the First Amendemnt does not. Article I, section 10 expressly provides for a "remedy by due course of law for injury done * * * [to] reputation"; the United States Constitution does not do so - at least expressly. Unlike the First Amendment, Article I, section 8 provides no basis for distinguishing between the communicative rights of the media and those of everyone else; it contains no "freedom of the press" language. *Wheeler v. Green, supra,* 286 Or at 117-18.[8]

We find no basis for interpreting the language of Article I, sections 8 and 10, as embodying a general requirement that a plaintiff can recover for injury to reputation only if he proves culpability greater than negligence on the defendant's part. We also find no basis in their language for concluding that the Oregon provisions are more restrictive than the First Amendment of recovery by private individuals for defamation by the media. As illustrated above, the language of Article I, sections 8 and 10 supports the opposite conclusion.

The parties make policy arguments in addition to their arguments based on constitutional language and case authority. Defenants' arguments are to the basic effect that a standard of culpability as low as negligence will have a "chilling effect" on the press, will

lead to self-censorship and will thereby deprive the public of its right to receive information. In essence, those arguments are the same ones the Supreme Court considered in its First Amendement decisions culminating in *Gertz*. For the reasons earlier stated, we do not interpret the language of Article I, section 8 to require more insulation of the media from liability for defamation than the First Amendment does. We also conclude that a higher standard of media liability than the First Amendment requires is unnecessary to give effect to the purposes of Article I, section 8 and that it would unduly restrict the right assured by Article I, section 10.

It is true that negligence is the minimum level of culpability which *Gertz* allows the states to establish as a basis for liability in defamation actions by private individuals against media

defendants. It does not follow that that minimum level is not adequately protective of the media. Indeed, the task that the Court set for itself in *Gertz* was to find the appropriate accommodation between the "state interest in compensating injury to the reputation of private individuals," 418 US at 343, on the one hand, and protection of the functions and constitutional freedoms of the media, on the other. The accommodation at which the Court arrived provides the media with greater constitutional insulation from recovery by defamed *private individuals* than it previously enjoyed under any previous opinion of the Supreme Court, except the plurality opinion in *Rosenbloom*, which was rejected in *Gertz* because it unduly restricted the ability of such individuals to recover damages for injury to reputation. The standard mandated by

Gertz is not "minimal" in the sense that it is insufficient or marginally sufficient to protect the media; it is "minimal" only in the sense that the states are left free, as a matter of federalism, to devise standards which differ from the requirements of the United States Constitution so long as their standards satisfy those requirements.[9]

Defendants offer no empirical data and no convincing theoretical basis for concluding that a negligence standard in defamation actions by private individuals will impair the liberties or hamper the functions of the media. That standard provides a significant additional component of proof to what a plaintiff was required to establish against any libel defendant at common law and to what a private plaintiff must only prove still to recover against a nonmedia defendant. *See Wheeler v. Green, supra,* 286

Or at 107-111.[10]

Moreover, the negligence standard is not the only protection available to media defamation defendants in Oregon. As noted earlier, *see* n 3, *supra,* punitive damages for libel are proscribed by Article I, section 8, even if the defendant acts with actual malice. In addition, media defendants are insulated by the retraction statute. Under ORS 30.160, *see* n 7, *supra,* a publisher or broadcaster of an unintentional defamation is subject only to special damages unless a retraction is demanded and is not published or broadcast at the end of a two-week investigatory period following demand. *See* ORS 30.165(2). Thus, in a very real sense, the negligence standard leaves a media defendant immune from general damages unless it is negligent twice -

first, in making a defamatory false statement and, second, in failing to retract the statement after a demand and investigation.

In sum, we do not agree that the negligence standard required by *Gertz* provides inadequate protection for the media in its coverage of private individuals, and we therefore do not think that a higher standard should have to be met by those individuals to vindicate their right under Article I, section 10 to a remedy for injury to reputation. Because we conclude that no higher standard is mandated by the language or policy of the relevant Oregon constitutional provisions, the negligence standard minamally required by the First Amendment is applicable.[11] We hold that, in a libel action against a media defendant, a plaintiff who is a private individual must prove the elements of

libel under the Oregon common law rule and, in addition, must prove that the defendant acted negligently in the measures taken to determine whether the defamatory statement was true or false.[12]

The remaining question is whether the evidence before the court in the summary judgment proceeding created a genuine issue of material fact as to whether defendants were negligent in failing to ascertain whether the defamatory statements were true or false. Defendants' only basis for arguing that there was not sufficient evidence is that they offered expert evidence to define and show that they met the standard of care of reasonable members of their profession in their community; that "[p]laintiffs submitted no counter-affidavit or other [expert] evidence either establishing the applicable standard of care journalists observe in similar situations or

demonstrating that Defendants breached that specific standard"; that expert evidence is "necessary to prove or disprove charges of negligence against professional persons"; and that "[a]lthough Oregon has not yet expressly ruled that journalists are professionals for purposes of determining the applicable standard of care in negligence actions, many courts since *Gertz*, as well as the Restatement (Second) of Torts, have adopted this rule." Plaintiffs argue that

> "[e]xpert testimony is not required to establish negligence in this case because whether or not the defendants took reasonable steps to ascertain the truth is not a matter beyond the knowledge of the average juror."

We agree generally with defendants that, when negligence is alleged against a media defendant, there should be a professional standard of care. Comment *g* to Restatement (Second) Torts, §580B (1977), states in part:

> "The defendant, if a professional disseminator of news, such as a newspaper, a magazine or a broadcasting station, or an employee, such as a reporter, is held to the skill and experience normally possessed by members of that profession. (See § 299A). Customs and practices within the profession are relevant in applying the negligence standard, which is, to a substantial degree, set by the profession itself, though a custom is not controlling. (See § 295A). * * *"

We conclude that the proper standard of care is that of a reasonably prudent, careful and skillful practitioner of the particular journalistic or other communicative school of which the defendant is a member. *See Creasey v. Hogan,* 292 Or 154, 163, 637 P2d 114 (1981).

We do *not* adopt a "locality" rule as part of the standard of care, *i.e.*, a rule *requiring* proof that the defendant's conduct is deficient compared to that of practitioners in the defendant's community or similar communities. For

purposes of proving negligence against media defendants, we conclude that evidence of practices in a particular community should be treated "as merely one factor to be taken into account in applying the general professional standard" and should not be an independent element or component of the standard. Prosser on Torts 164, § 32 (4th ed 1971); *see Cessnun v. Signer Motors, Inc.*, 64 Or App 129, 133, 666 P2d 1389 (1983), and authorities there cited.

We agree with the following statements in comments *g* and *h* to section 580B of the Restatement as *general* guidelines for the application of the standard of care we adopt:

> "Evidence of custom within the profession of news dissemination would normally come from an expert who has been shown to be qualified on the subject. It may be testimony that the course of conduct followed by the defendant was or was not in accordance wth recognized professional practices.

* * *

> "In determining whether the defendant acted as a reasonable, prudent [practitioner] under the circumstances in publishing the defamatory communication on the basis of his check or lack of check as to its accuracy and as to its defamatory character, there are factors to be taken into consideration. The thoroughness of the check that a reasonable person would make before he published the statement may vary with the play of these factors. The standard of care does not change, but its application may vary with the circumstances. One factor is the time element. Was the communication a matter of topical news requiring prompt publication to be useful, or was it one in which time and opportunity were freely available to investigate? In the latter situation, due care may require a more thorough investigation.
> * * *"

Whether expert testimony is relevant or necessary in a given situation must be determined in the light of relevant Oregon decisions, *e.g., Hall v. State,* 290 Or 19, 619 P2d 256 (1980); *Getchell v. Mansfield,* 260 Or 174, 489 P2d 953 (1971), as well as the standards of the Restatement.

Assuming that, to establish liability in this case, plaintiffs must adduce expert evidence of defendants' breach of the applicable standard of care, it does not follow that defendants were entitled to summary judgment because plaintiffs did not produce evidence of that kind in opposing defendants' motion. The party moving for summary judgment has the burden of showing the absence of genuine material factual questions "even as to those issues upon which the opposing party would have the trial burden." *Seeborg v. General Motors Corporation,* 284 Or 695, 699, 588 P2d 1100 (1978). The court stated in W. R. Chamberlin & Co. v. Northwestern Agencies, 289 Or 201, 611 P2d 652 (1980):

> "The question to be decided is whether the jury should have been bound to accept the expert's uncontradicted opinion. We hold that the jury may reject this conclusion because the weight of the opinion of an expert witness is a

> matter particularly within the province of the jury." 289 Or at 207.

It follows that plaintiffs were not required to controvert defendants' expert evidence to resist the motion for summary judgment. The correctness of that uncontradicted evidence *is itself* a genuine issue of material fact, and the evidence therefore did not satisfy defendants' burden of establishing as a matter of law that they were not negligent. *See Felske v. Worland*, 63 Or App 442, 445, n 2, 664 P2d 427 (1983).[13]

We hold that the trial court erred by granting summary judgment for defendants and by denying plaintiffs' motion to amend their complaint.

Reversed and remanded.

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[1]Plaintiffs here, like the Court in *Gertz, see* 418 US at 346-47, characterize the common law rule as one of "strict liability" or "liability without fault." That characterization is an oversimplification or an overstatement, but it is correct that the rule permits a

plaintiff to make out a prima facie case of libel without *direct* proof of the defendant's culpability other than the publication of the defamation.

---

[2]Justice White dissented in *Gertz*. He noted that he "continue[s] to subscribe to the *New York Times* decision and those decisions extending its protection to defamatory falsehoods about public persons." 418 US at 398. However, he disagreed with the majority's conclusion that there was a constitutional foundation for requiring a private individual to prove negligence in addition to establishing the common law elements of libel. He stated:

> "***The law governing the defamation of private citizens remained untouched by the First Amendment because until relatively recently, the consistent view of the Court was that libelous words constitute a class of speech wholly unprotected by the First Amendment, subject only to limited exceptions carved out since 1964.
>
> "But now, using that Amendment as the chosen instrument, the Court, in a few printed pages, has federalized major aspects of libel law by declaring unconstitutional in important respects the prevailing defamation law in all or most of the 50 States. That result is accomplished by requiring the plaintiff in each and every defamation action to prove not only the defendant's culpability beyond his act of publishing defamatory

material but also actual damage to reputation resulting from the publication. Moreover, punitive damages may not be recovered by showing malice in the traditional sense of ill will; knowing falsehood or reckless disregard of the truth will now be required.

"I assume these sweeping changes will be popular with the press, but this is not the road to salvation for a court of law. As I see it, there are wholly insufficient grounds for scuttling the libel laws of the States in such wholesale fashion, to say nothing of deprecating the reputation interest of ordinary citizens and rendering them powerless to protect themselves. ***" 418 US at 370.

---

[3]The Court also held in *Gertz* that punitive damages could not be recovered in a libel action against a media defendant, at least absent a showing of actual malice. 418 US at 349-50. In *Wheeler v. Green,* 286 Or 99, 117-19, 593 P2d 777 (1979), the Oregon Supreme Court held that punitive damages could not be assessed against *any* defamation defendant under any circumstances consistently with Article I, section 8 of the state constitution.

---

[4]Whether plaintiffs are public figures is, *at least* preliminarily, a question for the court. *See Wheeler v. Green,* 286 Or 99, 111, n 7, 593 P2d 777 (1979), and authorities there cited.

[5]Defendants also state:

> "***In addition, public figures are less deserving of constitutional protection because they have 'voluntarily exposed themselves to increased risk of injury from defamatory falsehood concerning them.' *Gertz v. Robert Welch, Inc., supra,* 418 US at 345, 94 S Ct at 3010, 41 L Ed 2d at 808. Plaintiff Bank by opening its doors to the public and dealing with that public as a fiduciary has entered the public arena and exposed itself to the risk of criticism."

That argument may or may not be intended as a separate one from the argument discussed in the text. In either event, *Bruno & Stillman, Inc., v. Globe Newspaper Co., supra,* is contrary to the suggestion that engaging in and advertising a business are enough to make a person a public figure for purposes of a "controversy" about his business activities which is generated by the defamation itself.

[6]Although we have found the amicus briefs helpful, they will receive little separate discussion. The amicus Oregon Newspaper Publishers Association's argument is generally consistent with defendants' and urges us to apply the reasoning of *New York Times* and adopt either an actual malice standard or some other standard requiring proof of greater culpability than negligence. The amicus American Civil Liberties Union (ACLU)

argues that we should construe the Oregon Constitution "to create an absolute privilege for all speech on matters of public concern," and thereby abolish any right of action for defamations arising out of such speech or, alternatively, "to require *all* plaintiffs *** to prove that the defendant *knowingly* made a false statement of fact." (Emphasis ACLU's.) For reasons which follow from our opinion, we do not accept the contention that the Oregon Constitution imposes greater restrictions on the right of private individuals to recover for injury to reputation than *New York Times* and later cases impose on public officials and public figures.

---

[7] ORS 30.160 provides:

> "(1) In an action for damages on account of a defamatory statement published or broadcast in a newspaper, magazine, other printed periodical, or by radio, television or motion pictures, the plaintiff shall not recover general damages unless:
>
> "(a) A correction or retraction is demanded but not published as provided in ORS 30.165; or
>
> "(b) The plaintiff proves by a preponderance of the evidence that the defendnat actually intended to defame the plaintiff.

(2) Where the plaintiff is entitled to recover general damages, the publication of a correction or retraction may be considered in mitigation of damages."

---

[8]The retraction *statute* considered in *Davidson v. Rogers, supra,* distinguishes between media and nonmedia defendants. We are aware of no challenge that has been made to that statute on the ground that it therefore violates the Fourteenth Amendment Equal Protection Clause of Article I, §§ 8 or 20 of the Oregon Constitution.

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[9]Since *Gertz* was decided, a substantial preponderence of state and federal courts applying state law have adopted the negligence standard.

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[10]However, as noted in *Wheeler,* "all defendants, not only those associated wth the media, continue to be protected by the *New York Times* rule in cases involving comment upon *public officials* and *public figures."* 286 Or at 110. (Emphasis supplied.)

---

[11]It is unnecessary to decide in this case whether Article I sections 8 and 10, require at least proof of negligence, independently of the First Amendment requirement. That question may

arise in subsequent defamation cases involving private individual plaintiffs and nonmedia defendants. *See* Comment, "Defamation and State Constitutions: The Search for a State Law Based Standard *After Gertz*," 19 Will L Rev 665 (1983).

---

[12]This opinion addresses only the requirement that plaintiffs must satisfy to make out a prima facie case. Nothing we have said should be understood as a comment on other matters, such as the defenses available to media or other defendants in a libel action. Here, for example, defendants have alleged affirmatively that their statements are true.

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[13]Given the basis for our holding that defendants were not entitled to summary judgment, we need not decide whether any evidentiary requirement this opinion establishes could properly be applied "retroactively" to the summary judgment proceeding we review. *See Dean v. Exotic Veneers, Inc.*, 271 Or 188, 531 P2d 266 (1975).

[Appendix C]

IN THE CIRCUIT COURT OF THE STATE OF OREGON
FOR MULTNOMAH COUNTY

BANK OF OREGON, a corporation, and HOMER G. WADSWORTH,	)	Case No. A7908-03679
Plaintiffs,	)	ORDER
v.	)	
INDEPENDENT NEWS, INC., a corporation, RONALD A. BUEL and RICHARD H. MEEKER,	)	
Defendants.	)	

Defendants' Motion for Summary Judgment is granted.

DATED this 15th day of March, 1982.

/s/ Richard L. Unis

Richard L. Unis
Circuit Court Judge

[Appendix D]

IN THE CIRCUIT COURT OF THE STATE OF OREGON
FOR MULTNOMAH COUNTY

BANK OF OREGON, a corporation, and HOMER G. WADSWORTH,	)	Case No. A7908-03679
Plaintiffs,	)	J U D G M E N T
v.	)	
INDEPENDENT NEWS, INC., a corporation, RONALD A. BUEL and RICHARD H. MEEKER,	)	
Defendants.	)	

BASED upon the Order granting Defendants' Motion for Summary Judgment;

IT IS ORDERED AND ADJUDGED that Plaintiffs' Complaint be dismissed, and that Defendants have judgment against Plaintiffs for their costs and disbursements incurred herein.

DATED this 18th day of March, 1982.

/s/ Richard L. Unis

Richard L. Unis
Circuit Court Judge

[Appendix E]

IN THE CIRCUIT COURT OF THE STATE OF OREGON
FOR MULTNOMAH COUNTY

BANK OF OREGON, et al, Plaintiffs, v. INDEPENDENT NEWS, INC. et al, Defendants.	Trial Court No. A7908-03679

Transcript of Opinion of

Richard L. Unis, Judge

February 26, 1982.

Appearing for Plaintiff:

Bernard Jolles
JOLLES, SOKOL & BERNSTEIN, P.C.
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Appearing for Defendant:

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The Court is of the view that ordinary negligence is not the standard of liability in a media defamation case in this state. And I think as a result of that I better get into the substantive reasons why I have concluded that.

I had prepared actually a written opinion, but I didn't put it in final form because of the procedural aspects that were involved. And so I'm going to, right at this time, express to you some of my reasons for the conclusion that the standard of liability in this state is not simple negligence in a media defamation case. And I want to make it clear a little bit the reasons why. Bear with me because I would like the record to reflect a little bit of something we all know, but with a little bit of tracing.

Though libel was once held to be a category of speech unprotected by the First Amendment of the Federal Constitution -- I'll omit the citation name, but the citation is 343 U.S., 250 (1952). That proposition has been substantially modified by subsequent United States Supreme Court decisions.

In the *New York Times Company v. Sullivan* (ph), 376 U.S. 254 (1964), the United States Supreme Court decided that the freedoms of speech and press protected by the First and Fourteenth Amendments of the Federal Constitution place restrictions on the state's common law of defamation.

New York Times held that the law of libel, to meet Federal Constitutional First and Fourteenth Amendments requirements, cannot permit a public official to recover damages for the defamatory falsehood relating to his or her official conduct unless it is proved with convincing clarity, that is, by clear and convincing evidence that the untrue

statement was made with actual malice; that is, with either -- that is either with knowledge that it was false or with wreckless [sic] disregard for whether it was false.

The *New York Times* rules was extended to public figures. *See Curtis Publishing Company v. Butts,* 388 U.S. 130 (1967) and its companion case, *Associated Press v. Walker,* 388 U.S. 130 (1967) and also *Gertz v. Robert Welch,* 418 U.S. 323 (1974).

In *Rosenbloom v. Metromedia,* 402 U.S. 29 (1971), a plurality of the United States Supreme Court supported an extension of the *New York Times* knowing or wreckless [sic] falsity standard of liability to any state civil libel action brought by a private person against a media defendant for a defamatory falsehood about the person's involvement in an event of public or general interest.

This extension of the full *New York Times* rule to defamatory falsehoods about persons involved in issues or events of public or general interest was disapproved by a majority of the United States Supreme Court in *Gertz v. Robert Welch, supra,* (418 U.S. 323).

In *Gertz,* the United States Supreme Court set off on a new path of limiting recovery for defamation by a private person than initially charged in *Rosenbloom v. Metromedia. Gertz* held that persons who are neither public officials nor public figures may recover for the publication of defamatory falsehoods as far as the First and Fourteenth Amendments of the Federal Constitution is concerned so long as state defamation law establishes a standard higher than strict liability, such as negligence.

Damages may not be presumed, however, but must be proved; that is,

recovery is limited to actual damages and punitive damages will be recoverable only upon the *New York Times* showing of knowing or wreckless [sic] falsity.

Under *Gertz,* states subject to their own state Constitutional and statutory requirements are free to determine the appropriate standard of liability in a civil defamation case brought by a private person against a media defendant, proving the standard of liability is higher than strict liability.

I won't take much longer, but I want to put on the record, I took certain things out of order because they were -- I had not anticipated this approach, but I think it's a fair approach.

In *Post v. Oregonian Publishing Company,* 268 Or 214, the Oregon Supreme Court speaking through then Chief Justice O'Connell, held that a civil libel action brought by a private individual against the media defendant for publishing a defamatory news story about a subject of public or general interest was barred because there was insufficient evidence to support a finding that the article was published by the Defendant with knowledge that it was false or with wreckless [sic] disregard of whether it was false or not.

In *Post,* the Oregon Supreme Court applied the principles set forth in *Rosenbloom v. Metromedia, supra* (403 U.S. 29), which was then in effect, and ruled that the news media are shielded by the First and Fourteenth Amendments to the Federal Constitution from liability for the publication of a defamatory story about a subject of public or general interest, unless published with knowledge that it was false or with wreckless [sic] disregard of whether it was false.

In Oregon there have been no post-*Gertz* cases that have dealt with -- I should say no appellate post-*Goertz [sic]* cases which -- that have dealt with the question as to what the standard of liability in a media defamation case is. This might not be in a sequence I would have given in a written opinion, but I'll make certain findings.

At the time of the publication of Defendant's article, neither Plaintiff could be viewed as a public official. Neither Plaintiff held elective or appointive office, nor was an employee of the Government having or appearing to the public to have substantial responsibility for or control over the conduct of Governmental affairs. *See Rosenblatt v. Baer,* 383 U.S. 75, 84-88 (1966).

Moreover, the record does not establish that either Plaintiff at the time of the publication of Defendant's article had achieved such pervasive fame or notoriety so as to become a public figure for all purposes and in all contexts, nor voluntarily thrust or injected itself or himself into a public controversy and therefore, became a public figure for a limited range of issues. *See Gertz v. Robert Welch, supra* (418 U.S. 323); *Times, Inv. v. Firestone,* 424 U.S. 448 (1976); *Hutchinson v. Proxmire,* 419 U.S. 111 (1979) and *Wolston v. Reader's Digest Association,* 443 U.S. 157 (1979).

Defendant's article, however, concerns Plaintiff's purported involvement in events of public or general interest. *See Rosenbloom v. Metromedia, Inc.,* 403 U.S. 29, 31-32 (1971); and *Post v. Oregonian Publishing Company,* 268 OR 214 (1974).

This civil defamation action, therefore, is brought by private persons

against a media defendant concerning events of public or general concern.

As observed above, the First and Fourteenth Amendments to the Federal Constitution require some degree of fault in a civil defamation action brought by a private person against a media defendant, *Gertz v. Robert Welch, supra* (418 U.S. 323).

The question is: How much?

Now, there are two possible ways in which the standard of liability, at least two possible ways in which the standard of liability can be mandated by a court. One is based upon the state Constitutional provision which is Article I, Section 8, which is the Freedom of Expression Provision in Oregon; that is, because a court could construe that provision to require a standard of liability higher than ordinary negligence or it could be on the basis of the judicial policy making authority or common law decision, common law or rule making authority of a court.

Now, in researching this matter trying to get some indication as to how the Court feels about Article I, Section 8 of the Oregon Constitution, there are some inconsistencies that appear to this Court as to whether or not the Freedom of Expression of the Oregon Constitution provides greater protection than that provided by the First Amendment and the Fourteenth Amendment of the Federal Constitution.

For example, in *State v. Childs,* 252 Or 91, particularly at Pages 99, 1968 case, the Oregon Supreme Court speaking through Mr. Justice Holman, said, we realize that we could construe the Freedom of Expression Provision of the Oregon Constitution, Article I, Section 8, as providing greater freedom of expression than that of the First Amendment of the

United States Constitution. We do not believe there is any legal basis for such a construction.

A later Oregon Court of Appeals decision took the same approach. The citation of that case is not immediately before me, but there is a case to that effect, however, in *Wheeler v. Green* and *Hall v. May Department Stores*. The Court in construing Article I, Section 8 of the Oregon Constitution and Article I, Section 10 of the Oregon Constitution did reach the conclusion that in defamation cases and even in an outrageous conduct case where pure speech was involved, that really those two Constitutional provisions were together, punitive damages were not available.

Now, this is something that obviously is construing Article I, Section 8 differently than the First and Fourteenth Amendments of the Oregon Constitution because as indicated previously, when the U.S. Supreme Court set forth the minimum standards of liability in *Gertz* that the states could impose in a media defamation case, they did indicate punitive damages could be awarded provided they were supported by a showing of actual malice; that is, a knowing or wreckless [sic] falsity standard. And in --

So, from all practical standpoints, the trial judge would be merely trying to gaze into the minds of the justices to find out what their final interpretation of it or -- the Constitutional provision, Article I, Section 8 would have in this context.

Therefore, I chose to conclude that this Court is free to decide on a non-Constitutional basis what the standard of liability should be. The reason for that is that the *Post v. The Oregonian* case was

decided on the Federal Constitutional grounds. It was decided at the time when the U.S. Supreme Court had set forth the standard of liability for cases involving public or general interest.

Therefore, I find that case is not controlling or binding on this trial court.

Now, I am of the view that the appropriate standard of liability in a media defamation case where it involves a matter of public or general interest or for that matter where it involves a private person bringing a case against a media defamation and weighing the Constitutional values from the standpoint of determining what the common law should be that of gross negligence. That is, gross negligence in the sense that there be a publication which would be consistent with the criteria for gross negligence that has been articulated in our other Oregon cases.

Now, I traced through briefly, I'd like to point out, I traced through the various positions that have been taken by the courts throughout the country and I was amazed at the various standards of liability.

Some courts have taken the view that the standard of liability in a media defamation case brought by a private person should be the actual malice test, the knowing and wreckless [sic] falsity test that is articulated in the *New York Times*.

At the other end of the spectrum, we find many courts have adopted the ordinary or simple negligence standard of liability and then some courts which have adopted the knowing or wreckless [sic] falsity standard have not accepted the Supreme Court's statement as to what that means. In other words, this

is something that we have gotten into earlier as to what is required to be proved by the knowing or wreckless [sic] falsity standard.

Well, in a series of cases, United States Supreme Court has stated that -- strike that. I want to read what I've written down here and I'll find the piece of paper -- I'm sorry, gentlemen. I quite frankly had intended to, I felt that I wasn't going to -- if necessary for me to express my belief as to the standard. But in any event, I'm going to do it now because I do believe after hearing arguments, that it probably would be better to take the approach that we have talked about here. Well, I can proceed I think without my finding my written paper.

But anyway, in a series of cases, particularly *St. Amants v. Thompson*, 390 U.S. 732 at 733, 1968, the court -- United States Supreme Court made it clear that wreckless [sic] disregard could not be shown by proof of mere negligence. For wreckless [sic] disregard there must be serious doubt as to the truth of the public and in the series of subsequent cases, the Supreme Court has made it very clear that this standard of liability that is set by the Constitutional malice standard which is set in the *New York Times* case is one which requires proving the state of mind of the defendant.

Just give me one minute. I have to find it because I would like to read the rest of what I wrote.

MR. JOLLES: Judge, while we're looking, could we take a minute- and-a-half?

THE COURT: Let me have a minute. I won't take more than five or ten minutes more to finish what I'm saying anyway.

Let's take a short break. That will give me an opportunity to find what I'm saying.

(Whereupon a brief recess was had.)

THE COURT: All right. I'll continue on.

What I was trying to say was in researching the question, to look at the various views that had been taken by the courts, the state courts throughout the country as to what standard they adopted in light of the *Gertz* case, I noted that some courts who were purportedly lined with jurisdictions that adopted the Constitutional malice test really hadn't gone that far.

For example, Colorado, in the case of *Walker v. The Colorado Springs Sun, Inc.*, reported at 538 Pacific Reporter, 2nd, at 450 --

MR. JOLLES: What was the citation?

THE COURT: 538 Pacific Reporter, 2nd, Page 450, 1975 case, and an en banke decision of the Supreme Court of Colorado, they adopted the wreckless [sic] disregard of the truth standard. In other words, they took the language of the *New York Times* case and said the standard is knowing or wreckless [sic] falsity. And it looked like they were adopting the *New York Times* case. But when you read the opinion, they did not adopt the interpretation of that or the explanation of the definition by the United States Supreme Court in *St. Amants* case as to what is wreckless [sic] disregard.

They said on Page 457:

> "We hold that when a defamatory statement has been published concerning one who is not a public official or a public figure, but the matter involved

> in of public or general concern, the publisher of the statement will be liable to the person defamed if, and only if, he knew the statement to be false or made the statement with wreckless [sic] disregard for whether it was true or not.
>
> "The *St. Amants* statement of serious doubts as a test of wreckless [sic] disregard has merit in that it gives a more concrete guideline to a jury with respect to wreckless [sic] disregard.
>
> "However, the consensus of the majority of our court is that we should not approve the *St. Amants* definition at this time since the term 'wreckless [sic] disregard' has had rather frequent usage in the tort field in this state."

In essence, they adopted in that case the gross negligence test or the wreckless [sic] disregard, but based upon objective rather than subjective analysis.

Because what I was trying to say and I didn't find it until during the break here is that wreckless [sic] conduct under the *New York Times* standard is

conduct not measured by whether a reasonable or prudent person would have published or investigated before publishing; there must be sufficient evidence to permit the conclusion that the Defendant in fact entertained serious doubts as to the truth of his publication.

Publishing with such doubt shows wreckless [sic] disregard for truth or falsity and demonstrates actual malice. That's the *St. Amants v. Thompson* case, 390 U.S. 727, quoting from 731. The proof of actual malice calls a defendant's state of mind into question.

Hutchinson v. Proxmire, 419 U.S. 120, Page 121, Footnote 9, 1979.

Now, it's the view of this Court for reasons which I will now articulate, that the standard of liability in this state for media defamation cases which has been brought by a Plaintiff who is neither a public official nor public figure but

involves a matter of public or general concern, the standard should be knowing or wreckless [sic] falsity but based upon the normal objective standard rather than subjective standard that has been given by the United States Supreme Court.

In other words, in essence, the approach the Colorado Supreme Court took in the *Walker* case, which was a higher standard. And it's further the view of this Court that the burden of proof should be a preponderance of the evidence and not clear and convincing evidence.

Now, I realize that in setting this, this is just one judge in this state studying a standard. But it seems to me that in balancing the issues involved, the right of a plaintiff to bring a tort action for claimed injuries to a reputation is a very important remedy and even protected by Article I, Section 10 of the Oregon Constitution.

But it's equally important that the press, the media, have a breathing space to be able to report without being subjected to such self-censureship [sic] that the purpose and function of the press will not be fulfilled.

I do not intend to articulate all the reasons stated in the *Gertz* opinion and subsequent opinions by the courts as to how important it is that there be -- that the press have the ability to apprise the public of matters of public or general concern, because I do find as a matter of law that what's published here in the article is a matter of public or general concern and that is a question which the Court must decide as a matter of law. That's clear by subsequent decisions in this state.

I believe that the -- to impose a standard of ordinary or simple negligence is too low of a standard. I do

not accept the view that's been taken in some courts that throughout the country that standard should be brought just because the *Gertz* opinion said states can impose that standard.

Now it is questionable to me whether or not the Constitution in Oregon, Article I, Section 8, can be construed broader. It can, if the justices of the Oregon Supreme Court say it can, but this Court is not a justice of the Oregon Supreme Court and I do not have the final word.

But I do believe that under the common law of this state, until a higher court determines otherwise, that the standard of liability should be the knowing or wreckless [sic] falsity or gross negligence standard without the construction that has been given or the explanation of that standard that has been given by the United States Supreme Court in the *St. Amants* case.

Now, with that in mind, the bottom line is that in my view, the evidence in this record, considered singly or cumulatively is insufficient to raise a jury question by a preponderance of the evidence that the alleged defamatory falsehoods were published with knowledge that they were false or with wreckless [sic] disregard of whether they were false by taking that phrase and applying the objective standard. Or to state, if we want to use the gross negligence definition, there is insufficient, which is usually used in this state, which is comparable to the Constitutional malice, it's only on the objective basis by a gross negligence standard in this state.

If a court wants to articulate the gross negligence standard different, there is insufficient evidence in the record considered singly or cumulatively

which would raise a jury question to establish gross negligence by a preponderance of the evidence. And I say as a trial judge that it's very important that whatever the standard of liability be, that it be one that can be easily administered. And one of the reasons why I have taken what in essence amounts to the gross negligence test, I believe it's high enough to give the press, the media, an appropriate protection so that they can write freely about matters of public or general concern without the fear of being brought to court on every matter in which there is a contest; that there hasn't been a full and adequate investigation.

At the same time, I believe that by having the gross negligence or knowing wreckless [sic] falsity standard based upon objective criteria, that the press will be subjected to again sufficient restraint to make sure that what they

publish has been -- there's been professional reporting before publication.

The bottom line is that I'm denying the motion to amend the pleading because of the fact that the pleading as amended have a Constitutional malice test; that there is insufficient evidence to support or make a general -- a jury question on.

And if that is construed to be a gross negligence test based upon objective criteria, there is insufficient evidence to support that to make a jury question, and that the negligence is not -- too low of a standard in a case of this type.

And I would say by way of dicta, which isn't important, I would deny the motion for summary judgment on the record, it is now if the standard of liability were ordinary or simple negligence except

that I would still be faced with the question of pleading which is a right of the Defendant to challenge whether or not the claim for relief that is stated in the new Complaint is sufficient in other aspects.

And just because it states a standard of liability -- let me strike that because it only states simple allegation of ordinary negligence which I do not believe to be the right standard of liability.

And the other claim for relief, there is not sufficient facts to support ia and I'm denying it.

Now, if it's determined that the standard of liability is simple negligence, it would be necessary then to give the parties the right to be heard regarding discovery on the development of the public figure, because what I made comments about the record here as to the

Plaintiffs --- I mean as to the Defendants not being public figures or public officials, that's on the status of this record and that would not mean that they would not be given an opportunity to supplement the record if such was necessary to prove otherwise.

Now, have I addressed the questions?

MR. JOLLES: Yes, Your Honor. And I would ask that I be permitted to prepare the order denying the motion for an Amended Complaint.

THE COURT: Do you have any objection?

MR. BROWN: No objection.

THE COURT: So you can do that, but I'd like to have you read it and confer with them and see if they have any objection.

MR. JOLLES: Of course. They can prepare the order allowing summary judgment.

THE COURT: All right. The motion for summary judgment will be allowed; the motion to amend will be denied for the reasons indicated.

I will say that it's a good question as to what the Court's going to do. They could go -- some different test they could apply; but I am of the view that upon much searching, that the gross negligence standard is the most reasonable standard balancing all the interests involved.

But I do believe a preponderance of the evidence should be sufficient quantum of proof rather than clear and convincing evidence.

MR. JOLLES: Thank you, Judge.

MR. BROWN: Your Honor, before we all break up, I would like to ask a question of form.

I customarily am very brief in my orders.

THE COURT: I want you to be brief. I had much difficulty with the pleading aspect of it and I had not anticipated expressing any opinion as to the standard of liability. But I do believe the approach here that's been reached today is probably, after hearing argument, is the most fair and equitable considering all the parties. At least it gives us an opportunity to -- I want to make one other finding; this is important. This is important.

I want to find also that ordinary negligence is not a lesser included species of liability than Constitutional malice. But you conceded in your letters to me, in your memorandums to me to have been pled in your original Complaint.

Now not only that since the Court finds that there were --there is insufficient facts to support a finding by

a preponderance of the evidence or clear and convincing evidence, that the alleged defamatory falsehoods were published with the knowledge that they were false or wreckless [sic] disregard with whether they were false or not. This is true by an objective or subjective standard. Then that means there are no factual allegations in the Complaint by which the Plaintiff -- which states a claim for relief.

So what I'm trying to say, Mr. Jolles, is that one could even say arguably, which we have a difference of view here as to whether or not ordinary negligence is a lesser included species of liability, then the *New York Times* actual malice pled in the Complaint, but without even having reached that, it was my conclusion that having determined that there wasn't sufficient facts to support what is alleged, there are nothing else

for which the Court can examine in the pleadings to determine and to measure the record -- to measure the facts in the record against determining whether or not there has been --ruling upon -- whether there has been a statement in ruling upon, whether there's been any claims for relief.

There is no factual allegation for example in Rule 18 of the Oregon Rules of Civil Procedure. It asked for plain and concise claims constituting relief. And I would point out that we are in -- we retain fact pleading as opposed to notice pleading; and I guess what I'm saying is having found nothing to support that which is pled by fact, there is nothing of which the Court could reach the conclusion as to measure against, to see whether or not there's been any breach of any other standard.

But in light of the fact that I have denied your motion to amend because I do not recognize ordinary negligence as a standard of liability, I guess what I'm saying now is really pure dicta because I was trying to say that one could take two approaches to the fact, even if ordinary negligence is the standard of liability than the *New York* actual malice.

So what it's not pled, there is no factual allegation, nothing to measure against. What are the specific allegations of negligence I'm supposed to see that the Defendants have violated?

So be that as it may, however, we'll go back to my finding. I'm denying your amendment because it doesn't state a claim for relief because ordinary negligence is not the standard of liability; and the only other claim for relief is based upon the Constitutional malice standard which the Court finds is

insufficient as well as the gross negligence, even judged by the reasonable person standard, is not --

MR. JOLLES: Could I ask you one question.

Are you saying that if there were a fact question of gross negligence, you would still allow summary judgment because we haven't pleaded gross negligence?

THE COURT: No. Because I think under the --

MR. JOLLES: So that is included in the Complaint?

THE COURT: No. I want to make it clear, you have conceded in your letter to me that you did plead initially Constitutional malice.

MR. JOLLES: Well, we pleaded what is [sic] says there.

THE COURT: But, you did concede in your letter --

MR. JOLLES: Knowing and wreckless [sic] falsity.

THE COURT: The precise words are in your letter to me is on page 3 of the January 30th, 1982 letter. You said based upon the foregoing, the Court should permit Plaintiffs to amend their Complaint to allege negligence in addition to Constitutional malice as a basis for recovery.

One of the things that we talked a long time about on the hearing of January 25th was whether or not you also alleged gross negligence by virtue of that language.

But in any event, I'm making a finding that there is no evidence to support either Constitutional malice or knowing or wreckless [sic] falsity in the gross negligence context based upon objective versus subjective contention; because I think I would have a different

view of whether or not ordinary negligence is a lesser species of liability then gross negligence, providing gross negligence were passed.

But anyway --

MR. JOLLES: You haven't reached the question because you ruled there is no fact to support gross negligence.

THE COURT: No fact to support gross negligence; no fact to support Constitutional malice. There are facts to support ordinary negligence, but ordinary negligence is not the standard of liability in a media defamation case, in a matter involving public --

MR. BROWN: I'll prepare the order.

[Appendix F]

IN THE SUPREME COURT OF THE
STATE OF OREGON

BANK OF OREGON et al, Respondents on Rehearing, v. INDEPENDENT NEWS, INC. et al, Petitioners on Rehearing.	)	CA A24067 SC S30174

In Banc

On petition for rehearing submitted January 28, 1985.

Decided March 20, 1985.

PER CURIAM

Petition for rehearing denied.

Linde, J., did not participate in this decision.

PER CURIAM

Defendants have petitioned for rehearing. Although we deny rehearing, we address one of the defendants' assertions.

In their petition for rehearing the defendants reassert, among other things, that the plaintiffs are public figures. The defendants also state that it is unclear from our opinion "whether a bank can ever be a public figure, even given a full evidentiary record at trial."

This case is before us on defendants' motions for summary judgment. Defendants assert that the plaintiffs, as a matter of law, are public figures. We have held that the plaintiffs are not, as a matter of law, public figures. On remand, the defendants are not foreclosed from attempting to establish that one or both plaintiffs are public figures.[1]

Rehearing denied.

Campbell, J., and Lent, J., agree that rehearing be denied, but do not join in the second and third paragraphs of this opinion. Roberts, J., would allow rehearing, but joins in the second and third paragraphs of this opinion.

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[1]This court has never decided whether it is for the court or jury to decide whether a plaintiff is a public figure. In *Wheeler v. Green*, 286 Or 99, 111, 593 P2d 777, (1979), we stated:

> "Defendants contend that the trial court erred in submitting to the jury the question whether plaintiff is a public figure. They are correct in their argument that when the facts are not in dispute this is a question for the court. In *Roseblatt v. Baer, supra,* 383 US 75, 88, 86 S Ct 669, 15 L ed 2d 597 (1966), the United States Supreme Court held that whether plaintiff was a public official was a question for the court. This is consistent with the general rule that the court, not the jury, determines whether a defamatory statement was made on a privileged occasion. *See, generally*, 1 Harper and James, Torts, 466-67 (1956); Prosser, Torts, 796 (4th ed 1971). Because of our disposition of the merits of the issue, the trial court's submission of the question

to the jury could not have prejudiced defendants."